



135 HC

# THE INDIAN LAW REPORTS

## — ALLAHABAD SERIES,

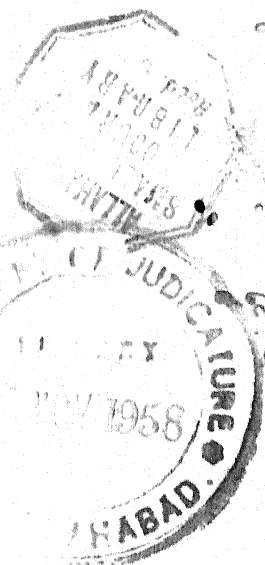
CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND  
BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON  
APPEAL FROM THAT COURT AND FROM THE COURT  
OF THE JUDICIAL COMMISSIONER OF OUDH.

REPORTED BY:

Privy Council	...	J. V. WOODMAN, <i>Middle Temple</i>
High Court, Allahabad	...	W. K. PORTER, <i>Gray's Inn.</i>

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# JUDGES OF THE HIGH COURT.

CHIEF JUSTICE.

THE HON'BLE SIR JOHN STANLEY, KT., K.C.

POISNE JUDGES.

THE HON'BLE MR. JUSTICE G. E. KNOX.

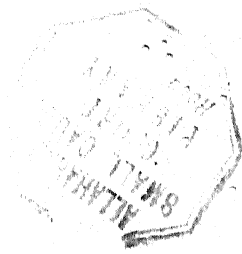
" " " H. F. BLAIR [*Retired on the  
29th March,  
1905.*]

" " " P. C. BANERJI.

" " " SIR WILLIAM BURKITT.

" " " R. S. AIKMAN [*On furlough  
from the 13th  
May, 1905, for  
3 months.*]

" " " H. G. RICHARDS [*Took his seat  
the 30th  
March, 1905.*]



A TABLE  
OF THE  
NAMES OF THE CASES REPORTED IN THIS  
VOLUME.

PRIVY COUNCIL.

	Page.
Achal Ram v. Kazim Hussain Khan ...	271
Bishambhar Das v. Drighbijai Singh ...	581
Durga Bakhsh Singh v. Muhammad Ali Beg ...	1
Gopi Narain Khauna v. Bansidhar ...	325
Muhammad Munawwar Ali v. Razia Bibi ...	320
Nurjahan Begam v. Faghfur Mirza ...	383
Qamar-ud-din Ahmad v. Jawahir Lal ...	334
Rampal Singh v. Ram Prasad Singh ...	37
Ritraj Kunwar v. Sarfaraz Kunwar ...	655
Sheo Singh v. Raghubans Kunwar ...	634

FULL BENCH.

Baldeo Prasad v. Fakhr-ud-din ...	62
Baldeo Prasad v. Juthan Ram ...	684
Lasyat Singh v. Izzat-un-nissa Begam ...	97
Karan Singh v. Bhup Singh ...	16
Madari v. Baldeo Prasad ...	351
Mangal v. Sahib Ram ...	544
Ram Bahadur Pal v. Ram Shanker Prasad Pal ...	688
Sham Sundar v. Muhammad Ihtisham Ali ...	501

APPELLATE CIVIL.

Abdul Qayyum v. Sadr-ud-din Ahmad ...	408
Ahmad-ul-lah Khan v. Salar Bakhsh ...	488
Ahmad-ul-lah v. Dakkhini Din ...	575
Ali Akbar v. Khurshed Ali ...	695
Anand Sarup v. Sultan Singh ...	509
Asad-ul-lah v. Muhammad Nur ...	459
Ausari Lal v. Bhajan Lal ...	602
Babu Lal v. Asai Kunwar ...	197
Bahadur Singh v. Ram Singh ...	12
Baldeo Prasad v. Ibn Haidar ...	625
Balmakund v. Kundan Kunwar ...	452
Banb Lal v. Manni Lal ...	450
Basa Mal v. Ghayaa-ud-din ...	356
Bismawan Kurmi v. Nakehedi Pande ...	174
Boni v. Puran Das ...	190
Bhagat Bihari Lal v. Ram Nath ...	704
Bhajan Lal v. Muhammad Abdus Samad Khan ...	556
Chatarpal v. Jagram ...	411
Chunni Lal v. Jugul Kishore ...	132
Damodar Das v. Girdhari Lal ...	564
Dhani Ram v. Bhola Singh ...	21
Durga Das v. Gullu ...	87
Durga Prasad v. Parandar Singh ...	186

# TABLE OF CASES REPORTED.

	Page.
Faiz-un-nissa v. Hanif-un-nissa ...	642
Parasand Ali Khan v. Hasmillah Begam ...	23
Ganga Bakhsh v. Jagannath ...	305
Ganga Ram v. Kanhaiya Lal ...	254
Gatti Lal v. Bir Bahadur Sahai ...	158
Ghazi-ud-din v. Bishan Dial ...	448
Gobind Prasad v. Inayat Khan ...	310
Godu Ram v. Suraj Mal ...	378
Gopal Das v. Badri Nath ...	361
Hans Raj v. Ratni ...	200
Harnam Chander v. Muhammad Yar Khan ...	485
Har Prasad v. Jagan Lal ...	56
Hill v. Clarke ...	266
Idarat Khan v. Hahi Bakhsh ...	78
Inayat Ali Khan v. Murad Ali Khan ...	569
Jagan Nath v. Bhawani ...	167
Jagar Nath Singh v. Jai Nath Singh ...	88
Jaggi Lal v. Cooper ...	696
Jadunath Prasad v. Girdhar Das ...	513
Jai Singh Pal Singh v. Bijai Pal Singh ...	417
Jamna Das v. Ramautar Pande ...	364
Jiwan Ram v. Ram Sarup Ram ...	67
Kanhai Lal v. Kalka Prasad ...	670
Kashi Gir v. Jogendra Nath Ghose ...	186
Kharag Singh v. Pola Ram ...	31
Khatun Bibi v. Sayida Bibi ...	457
Khuda Bakhsh v. Alim-un-nissa ...	313
Khuda Bakhsh v. Aziz Alam ...	194
Kirat v. Debi Singh ...	308
Kuber Singh v. Shib Lal ...	263
Kundan Lal v. Faqir Chand ...	75
Mahabir Prasad Rai v. Bishan Dayal ...	71
Maharaja of Benares v. Ramji Khan ...	138
Mahesh Prasad v. Ranjor Singh ...	183
Mahip Rai v. Dwarka Rai ...	453
Manmatha Nath Biswas v. Rohilli Moni Dasi ...	406
Malhi Kunwar v. Imam-ud-din ...	59
Mardan Singh v. Thakur Sheo Dayal ...	549
Mata Din v. Jamna Das ...	691
Mian Jan v. Abdul ...	572
Mihin Lal v. Badri Prasad ...	436
Mubarak Hussain v. Kaniz Bano ...	160
Muhammad Abdul Hai v. Nathu ...	183
Muhammad Abdul Rashid Khan v. Dilsukh Rai ...	517
Muhammad Husain v. Mul Chand ...	395
Muhammad Rahmat-ul-lah v. Bacheho ...	537
Munawar Hussain v. Jani Bijai Shankar ...	619
Mustafa Khan v. Phulja Bibi ...	526
Nabi Muhammad v. Jwala Prasad ...	148
Nand Ram v. Ram Prasad ...	145
Nawab Begam v. Creet ...	678
Nazir Hasan v. Shibha ...	81
Nepal Rai v. Debi Prasad ...	447
Pahlwan Singh v. Ram Bhargose ...	169
Parmanand v. Lokman Das ...	392
Radha Krishna Das v. The Municipal Board of Benares ...	592
Raghunath v. Ganpatji ...	274
Rahim-ud-din v. Ram Lal ...	155
Raj Bahadur v. Bharat Singh ...	243
Raj Narain Mittar v. Budh Sen ...	333
Rambhajan Kunwar v. Gurcharan Kunwar ...	14

# TABLE OF CASES REPORTED.

iii

	Page.
Ram Charan Rai v. Kauleshar Rai ... ..	153
Ram Dei Kunwar v. Abu Jafar ... ..	494
Ram Din v. Pokhar Singh ... ..	553
Ram Jatan Rai v. Ramhit Singh ... ..	511
Ram Lal v. Chunni Lal ... ..	372
Ram Prasad v. Bhiman ... ..	151
Ram Subhag v. Nar Singh ... ..	472
Ranoo Rai v. Rafi-ud-din ... ..	82
Rugad Singh v. Sat Narain Singh ... ..	178
Sahadur v. Rajwaha ... ..	96
Salig Ram v. Kali Shankar ... ..	465
Sarabjit Partap Bahadur Sahi v. Indarjit Partap Bahadur Sahi ... ..	208
Sheo Dat v. Sheo Shankar Singh ... ..	53
Sheo Narain v. Mata Prasad ... ..	73
Sikandar v. Bahadur ... ..	462
Sukh Lal v. Madhuri Prasad ... ..	540
Tufail Fatma v. Bitola ... ..	400
Udit Narain Singh v. Murtaza Khan ... ..	464
Udit Upadhyay v. Bhawani Din ... ..	84
Wahid-un-nissa v. Girdhari ... ..	702
Zinat-un-nissa v. Rajan ... ..	142

## REVISIONAL CIVIL.

Dhan Devi v. Zamurrad Begam ... ..	440
Godu Ram v. Suraj Mal ... ..	380
Hukam Singh v. Raghunir Saran ... ..	700
McCarron v. Wetti ... ..	192
Turner v. Jagmohan Singh ... ..	581

## MISCELLANEOUS CIVIL.

Bawani Prasad v. Kutub-un-nissa Bibi ... ..	559
Chhedi v. Gulabo ... ..	622

## APPELLATE CRIMINAL.

Emperor v. Maula Bakhtish ... ..	28
— v. Udmi ... ..	262

## REVISIONAL CRIMINAL.

Abdur Razzaq v. Rahmat-ul-lah ... ..	630
Budhni v. Dabal ... ..	11
Chet Ram. In the matter of the petition of— ... ..	623
Emperor v. Abdul Sattar ... ..	567
— v. Abdullah ... ..	499
— v. Aziz-ud-din ... ..	294
— v. Balwant ... ..	293
— v. Bazid ... ..	293
— v. Bishan Das ... ..	561
— v. Ganeshi Lal ... ..	258
— v. Ganga Prasad ... ..	260
— v. Jagan Nath ... ..	468
— v. Jagardeo Pande ... ..	469
— v. Ishtiaq Ahmad ... ..	63
— v. Kalla ... ..	92
— v. Mohan Lal ... ..	25
— v. Nanhe ... ..	33
— v. Narbadeshwar ... ..	491

	Page.
Emperor v. George Powell	237
— v. Ramoshar	300
— v. Shib Singh	292
— v. Tara Singh	480
Gendan Lal v. Abdul Aziz Khan	302
Manki v. Bhagwanti	415
Nur Muhammad v. Ayosha Bibi	483
Qayyum Ali v. Faiyaz Ali	359

## MISCELLANEOUS CRIMINAL.

Martin. In the matter of the petition of T. A.—	296
Mithu Khan. In the matter of the petition of —	172

# TABLE OF CASES CITED.

## A.

	Page.
Abaji Sitaram Modak v. The Triumbak Municipality, I. L. R., 28 Bom., 66, referred to ...	598
Abdul Aziz Khan v. Appayasami Naicker, L. R., 31 I. A., 1, referred to ...	124
Abdul Wahid v. Wilayat Husain, Weekly Notes, 1902, p. 109, referred to ...	555
Abid Husen v. Bashir Ahmad, I. L. R., 20 All., 499, followed ...	162
Agacio v. Forbes, 14 Moo., P. C., 160, followed ...	362
Ahmad Ali v. Naziran, I. L. R., 24 All., 542, referred to ...	629
Ajudhia Bakhsh Singh v. Arab Ali Khan, I. L. R., 7 All., 892, referred to ...	80
Alarakhia Shivji v. Jehangir Hormasji, 10 Bom., H. C. Rep., 391, followed ...	528
Altaf Ali Khan v. Lalta Prasad, I. L. R., 19 All., 496, referred to ...	318
Alu Prasad v. Sukhan, I. L. R., 3 All., 610, referred to ...	14
Arunugam Chetti v. Arunachalam Chetti, I. L. R., 22 Mad., 22, followed ...	461
Ashraf-un-nissa v. Ali Ahmad, I. L. R., 26 All., 601, referred to ...	572
Atma Ram v. Balkishen, I. L. R., 5 All., 266, followed ...	24

## B.

Bidri Prasad v. Sheodhian, I. L. R., 18 All., 354, followed ...	83
Bai Nani v. Chunilal, I. L. R., 22 Bom., 973, followed ...	429, 433
Baij Nath v. Sital Singh, I. L. R., 13 All., 224, referred to ...	674
Baldeo Singh v. Imdad Ali, I. L. R., 15 All., 189, distinguished ...	166
Balkaran Rai v. Gobind Nath Tiwari, I. L. R., 12 All., 129, distinguished ...	199
Balkishen Das v. Legge, I. L. R., 22 All., 149, referred to ...	617
Balraj Kunwar v. Rao Jagatpal Singh, 31 I. A., 132; I. L. R., 26 All., 393, referred to ...	648
Bafwant Rao v. Puran Mal, I. L. R., 6 All., 1; s. c., L. R., 10 I. A., 90, referred to ...	515
Bansi Dhar v. Gaya Prasad, I. L. R., 24 All., 179, distinguished ...	402
Bapujirao v. Fatesing Shahaji Bhosle, I. L. R., 22 Bom., 967, followed ...	456
Behari Das v. Kalian Das, I. L. R., 8 All., 543, dissented from ...	461
Bejoy Chunder Banerjee v. Kally Prosonno Mookerjee, I. L. R., Calc., 327, referred to ...	397
Beni Madho v. Basdeo Patak, I. L. R., 12 All., 99, referred to ...	19
Benyon v. Nettlefold, 3 MacN. and G., 94, referred to ...	271
Bhagwan Singh v. Bhagwan Singh, I. L. R., 17 All., 294 and 21 All., 412, referred to ...	421, 436
Bhairon Rai v. Saran Rai, I. L. R., 26 All., 588, distinguished ...	90
Bhola Nath v. Buskin, Weekly Notes, 1894, p. 127, referred to ...	154
Bhuggobutty Dossee v. Shamachurn Bose, I. L. R., 1 Calc., 337, referred to ...	91
Binda v. Kaunsilia, I. L. R., 13 All., 126, referred to ...	522
Bishan Dial v. Ghazi-ud-din, I. L. R., 23 All., 175, discussed ...	97
British Insulated Wire Co. v. The Prescott Urban District Council, L. R. 1895, 2 Q. B. D., 463, followed ...	444
	597



	Page.
Brojo Behari Mitter, v. Kedar Nath Mozumdar, I. L. R., 12 Calc., 580, followed ...	61
Bungsee Singh v. Soodist Lall, I. L. R., 7 Calc., 739, followed ...	362

## C.

Chajju Singh v. Kanhai, Weekly Notes, 1881, p. 114, referred to ...	344
Chamaili Rani v. Ram Dai, I. L. R., 1 All., 552, followed ...	189
Chanvirapa v. Danava, I. L. R., 19 Bom., 593, referred to ...	250
Chattar v. Newal Singh, I. L. R., 12 All., 64, followed ...	621
Chiranjil Lal v. Jawahir Mal, Weekly Notes, 1904, p. 95, followed ...	59
Chinto v. Janki, I. L. R., 18 Bom., 51, referred to ...	397
Chotu v. Hussain Bakhsh, Weekly Notes, 1893, p. 101, referred to ...	162
Chowdry Pudum Singh v. Keer Oodey Singh, 12 Moo., I. A., 350, referred to ...	434
Chundra Nath Dey v. Burroda Shoondury (Ghose), I. L. R., 22 Calc., 813, distinguished ...	451
Chunni Lal v. Harnam Das, I. L. R., 20 All., 302, referred to ...	628

## D.

Dalaganjan Singh v. Kalka Singh, I. L. R., 22 All., referred to ...	607
Dalip Rai v. Deoki Rai, I. L. R., 21 All., 204, referred to ...	374
Dandekar v. Dandekars, I. L. R., 6 Bom., 663, followed ...	528
Daya Kishan v. Nanhi Begam, I. L. R., 20 All., 304, followed ...	578
Debi Prasad v. Puran, Weekly Notes, 1898, p. 40, referred to ...	632
Dhiraj Kumar v. Bikramajit Singh, I. L. R., 3 All., 787, referred to ...	268
Durga Charan Mandal v. Kali Prasanna Sarkar, I. L. R., 26 Calc., 727, followed ...	703
Durga Singh v. Bisheshwar Dayal, I. L. R., 24 All., 218, referred to ...	199
Dwarka Das v. Kameswar Prasad, I. L. R., 17 All., 69, explained ...	442

## E.

Emperor v. Jangi Singh, I. L. R., 26 All., 194, referred to ...	299
— v. Tota, I. L. R., 25 All., 272, followed ...	294
Empress of India v. Amar Nath, I. L. R., 5 All., 318, referred to ...	259
— v. Berrill, I. L. R., 4 All., 141, distinguished ...	399

## F.

Poster v. Green, 7 H. and N., 881, followed ...	633
---	-----

## G.

Ganeshi. In the matter of the petition of —, I. L. R., 15 All., 192, followed ...	37
Ganga Prasad v. Chunni Lal, I. L. R., 18 All., 113, distinguished ...	476, 479
— referred to ...	512
Gangayya v. Mahalakshmi, I. L. R., 10 Mad., 90, referred to ...	409
Gedge v. Royal Exchange Assurance Corporation, I. R., 1900, 2 Q. B., 214, referred to ...	271
Ghure v. Man Singh, I. L. R., 17 All., 226, referred to ...	609
Girish Chunder Ghose v. Queen-Empress, I. L. R., 20 Calc., 857, referred to ...	35
Gobind Singh v. Baldeo Singh, I. L. R., 25 All., 330, followed ...	498
Gokal Singh v. Mannu Lal, I. L. R., 7 All., 772, referred to ...	606



# TABLE OF CASES CITED.

vii

Page.

Gonesh Das Bagria v. Shiva Lakshman Bhakat, I. L. R., 30 Calc., 583, followed	...	160
Govind Prasad v. Mohan Lal, I. L. R., 24 All., 157, followed	...	170
Greeman Singh v. Wahari Lal Singh, I. L. R., 8 Calc., 12, dissented from	...	408
Gulzari Mal v. Madho Ram, I. L. R., 26 All., 447, followed	...	156
Gurdial Mal v. Jauhri Mal, I. L. R., 7 All., 820, followed	...	307

## H.

Hari Kishore Mitra v. Abdul Baki Miah, I. L. R., 21 Calc., 920, referred to	...	35
Holman v. Johnson, 1 Cowper, 341, referred to	...	270
Horsfall v. Thomas, 31 L. J., Ex., 322, referred to	...	564
Hurronath Roy Bahadoor v. Krishna Coomar Bukshi, L. R., 13 I. A., 123, referred to	...	377

## I.

Imam Bakhsh v. Chundo, Weekly Notes, 1886, p. 69, followed	...	145
In re Bulakidas, I. L. R., 23 Bom., 484, followed	...	484

## J.

Jainti Prasad v. Bachu Singh, I. L. R., 15 All., 65, distinguished	...	199
Jai Ram v. Mahabir Rai, I. L. R., 7 All., 720, followed	...	467
Jhannman Kunwar v. Tiloki, I. L. R., 25 All., 435, followed	...	498
Juala Singh v. Narain Das, I. L. R., 3 All., 541, followed	...	528

## K.

Kali Charan v. Ahmad Shah Khan, I. L. R., 17 All., 48, referred to	...	77
Kali Prosunno Basu Roy v. Lal Mohun Guha Roy, I. L. R., 25 Calc., 258, dissented from	...	578
Kallu Rai v. Fahiman, I. L. R., 13 All., 124, followed	...	578
Kapaleo Bewah v. Keshram Kooch, 11 W. R., 93, followed	...	623
Karim Bakhsh Khan v. Phula Bibi, I. L. R., 8 All., 102, referred to	...	14
Khairaj Mal v. Daim, I. L. R., 32 I. A., 23, referred to	...	524
King-Emperor v. Gulzari Lal, I. L. R., 24 All., 254, followed	...	70
Kishen Sahai v. The Collector of Allahabad, I. L. R., 4 All., 137, referred to	...	578
Krishnarav v. Antaji Virupuksha, 12 Bom., H. C. Rep., 227, followed	...	561

## L.

Lachman Singh v. Bhagwan Singh, Weekly Notes, 1886, p. 49, followed	...	706
Lakshmiipathi v. Kandasami, I. L. R., 16 Mad., 54, referred to	...	252
Lalit Mohun Singh Roy v. Chukkun Lal Roy, I. L. R., 24 Calc., 834, referred to	...	307

## M.

Mahabir Prasad v. Sital Singh, I. L. R., 19 All., 520, referred to	...	508
Mahadeo Prasad v. Raja Sawal Singh, L. P. A., No. 8 of 1902, decided 18th June 1902, discussed	...	488

	Page.
Maheshur Mondul v. Koilash Nath Mundul, 7 C. L. R., 71, followed	628
Man Khan v. Mamur Khan, Weekly Notes, 1886, p. 56, distinguished	467
Man Kuar v. Jasodha Kuar, I. L. R., 1 All., 478, referred to	268
Mana Vikrama v. Mallichery Kristnan Nambudri, I. L. R., 3 Mad., 68, followed	528
Manohur Khan v. Troyluckhonath Ghose, 4 W. R., 35, followed	465
Martand v. Dhondo, I. L. R., 22 Bom., 624, referred to	522
Mata Din v. Mahesh Prasad, Weekly Notes, 1892, p. 100, referred to	606
Mata Din Kasodhan v. Kazim Husain, I. L. R., 13 All., 432, referred to	478
Mayan Pathuti v. Pakuran, I. L. R., 22 Mad., 347, approved	523
Meenakshi Naidu v. Immudi Kanaka Ramaya Kounden, L. R., 16 I. A., 1, referred to	19
Mendai Lal v. Bhujja Singh, Weekly Notes, 1895, p. 140, referred to	263
Milward v. The Earl of Thanet, 5 Ves., 720 N., referred to	679
Misri Lal v. Abdul Aziz Khan, Weekly Notes, 1901, p. 158, overruled	477, 479
Mohesh Sower v. Narain Bag, I. L. R., 27, Calc., 581, followed	298
Morris v. Nugent, 7 Car. and P., 572, referred to	536
Moti Lal Chakrabutty v. Russick Chandra Bairagi, I. L. R., 26 Calc., 326, foot-note, followed	703
Moulshkan v. Gorikhan, I. L. R., 14 Bom., 627, followed	456
Muhammad Ahmad v. Muhammad Siraj-ud-din, I. L. R., 23 All., 423, followed	413
Muhammad Husain v. Bidri Prasad, Weekly Notes, 1895, p. 88, distinguished	438
Mulchand v. Mukta Pal, Weekly Notes, 1896, p. 100, referred to	504
Mul Chand v. Shib Charan Lal, I. L. R., 2 All., 676, followed	189
Musammatt Battas Kuar v. Lachman Singh, N.-W. P., H. C. Rep., 1875, p. 117, discussed	427, 432
Musammatt Nanomi Babuasine, Modan Mohun, L. R., 13 I. A., 1, referred to	19
Muthu Vija Raghunatha Ramachandra Vacha Mahali Thurai v. Venkatachallam Chetti, I. L. R., 20 Mad., 35, referred to	479
<b>N.</b>	
Nand Lal v. Hanuman Das, I. L. R., 26 All., 308, referred to	137
Narain Singh v. Parbat Singh, I. L. R., 23 All., 247, distinguished	547
Nawab Sultan Mariam Begum v. Nawab Sahib Mirza, L. R., 16 I. A., 175; I. L. R., Calc., 234, distinguished	391
Niaz Gul Khan v. Durga Prasad, I. L. R., 15 All., 9, followed	147
Nundo Pershad Thakur v. Gopal Thakur, I. L. R., 10 Calc., 1008, dissented from	162
<b>O.</b>	
Oudh Behari Lal v. Nageshar Lal, I. L. R., 13 All., 278, discussed, referred to	505 627
<b>P.</b>	
Paigi v. Shoo Narain, I. L. R., 8 All., 78, referred to	97
Partab Bahadur Singh v. Gajadhar Bakhsh Singh, L. R., 29 I. A., 148, Sc., I. L. R., 24 All., 521, referred to	317
Pettachi Chettiar, v. Sangili Veera Pandia Chinnathambiar, L. R., 14 I. A., 84, referred to	123
Phul Chand, v. Lakkhu, I. L. R., 25 All., 358, referred to	171

## TABLE OF CASES CITED.

ix

	Page
Pirbhu Narain Singh, v. Sita Ram, I. L. R., 13 All., 94, in part dis- sented from	448
Pitam Singh v. Vjagar Singh, I. L. R., 1 All., 651, referred to	250
Poresh Nath Mojumdar v. Ramjodu, Mojumdar, I. L. R., 16 Calc., 246, referred to	505
Prosunno Kumar Sanyal v. Kali Das Sanyal, I. L. R., 19 Calc., 683, referred to	703

## Q.

Queen v. Handsley, L. R., 8 Q. B. D., 383, referred to	27
— followed	37
— Empress v. Lalit Tiwari, I. L. R., 21 All., 177, followed	94
— v. Madho, I. L. R., 15 All., 25, followed	471
— v. Manikun, I. L. R., 19 Mad., 263, referred to	35
— v. Pirthipal Singh, Weekly Notes, 1898, p. 154, followed	294
— v. Poomalai Udayan, I. L. R., 21 Mad., 296, refer- red to	500
— v. Wazir Jan, I. L. R., 10 All., 58, referred to	295
— v. Sitaram Vithal, I. L. R., 11 Bom., 657, followed	471

## R.

Ragavendra Rau v. Jayaram Rau, I. L. R., 20 Mad., 283, followed	428, 432
Raham Hahi Khan v. Ghasita, I. L. R., 20 All., 375, referred to	505
Rahimbhoy Habibhoy v. Turner, I. L. R., 17 Bom., 341, referred to	543
Rahman Chaudhri v. Salamat Chaudhri, Weekly Notes, 1901, p. 48, referred to	90, 91, 155
Raj Bahadur v. Bharat Singh, I. L. R., 348, followed	439
Raj Kishen Singh v. Ramjoy Surma Mozoomdar, I. L. R., 1 Calc., 186, referred to	243
Raja Har Narain Singh v. Chaudhrain Bhagwant Kumar, I. L. R., 13 All., 300, referred to	401
Ramachandra Joishi v. Hazi Kassim, I. L. R., 16 Mad., 207, fol- lowed	694
Ramasami Kamaya Naik, v. Sundaralingasami Kamaya Naik, I. L. R., 17 Mad., 422, referred to	252
Ramasory Lall v. Queen-Empress, I. L. R., 27 Calc., 452, dissented from	292
Ran Chand v. Durga Prasad, I. L. R., 26 All., 61, referred to	80
Ram Chandra Mistry v. Nobin Mirdha, I. L. R., 25 Calc., 630, dis- tinguished	416
Ram Das v. Bhagwat Das, Weekly Notes, 1905, p. 1, referred to	377
Ram Dayal Rai v. Durga Singh, I. L. R., 12 All., 209, overruled	18
Ram Janam Rai v. Rameshar, Rai, Weekly Notes, 1892, p. 5, fol- lowed	686
Ram Jatan Shukul v. Jaisar Shukul, Weekly Notes, 1894, p. 166, referred to	91
Ramsden v. Dyson, L. R., 1 E. and L. A., 129, referred to	341, 346
Ranbir Singh v. Drigpal, I. L. R., 16 All., 23, referred to	507
Ranjit Singh v. Shro Prasad Ram, I. L. R., 2 All., 487, followed	24
Rani Anund Koer v. The Court of Wards, L. R., 8 I. A., 14, fol- lowed	409
Rucha Rao v. Parmeshur Dyal, N.-W. P., H. C. Rep., 1870, 252, fol- lowed	456
Rujjub Ali Chopedar v. Chundi Churn Bhadra, I. L. R., 17 Calc., 543, followed	162
Rup Jan Bibee v. Abdul Kader Bhuyan, S C. W. N., 496, dissented from	24

# TABLE OF CASES CITED.

	Page.
<b>S.</b>	
Shah Lal Chand v. Indarjit, I. L. R., 22 All., 371, referred to ...	616
Sahibzadi v. Alahdiya, Weekly Notes, 1902, p. 147, dissented from ...	162
Salig Ram v. Har Charan Lal, I. L. R., 12 All., 548, considered ...	77
— v. Jhunna Kuar, I. L. R., 4 All., 546, followed ...	55
Sarman v. Khuban, I. L. R., 16 All., 476, referred to ...	193
Scott v. Brown, Doering, McNab & Co., I. L. R., 1892, 2 Q. B. D., 724, referred to ...	270
Serjeant v. Dale, I. R., 2 Q. B. D., 558, referred to ...	85
Shanto Chandar Mukerji v. Nain Sukh, I. L. R., 23 All., 355, followed ...	589
Sheoambar v. Deodat, I. L. R., 9 All., 168, followed ...	55
Sheoambar Singh v. Lallu Singh, I. L. R., 9 All., 30, foot-note, followed ...	694
Sheo Balak Singh v. Lachmidhar, I. L. R., 23 All., 427, referred to ...	458
Sheodani Tewari v. Ram Saran Singh, I. L. R., 26 Calc., 164, referred to ...	522
Sheo Shankar v. Parma Mahlon, I. L. R., 26 All., 559, followed ...	181
Sheo Narain Rai v. Rameshar Rai, I. L. R., 18 All., 279, referred to ...	571
Shiam Lal v. Chhaki Lal, I. L. R., 22 All., 229, followed ...	75
Shib Lal v. Hira Lal, Weekly Notes, 188, p. 133, followed ...	55
Simbhu Nath Panday v. Golab Singh, I. R., 14 I. A., 77, referred to ...	123
Soorendro Nath Roy v. Mussamut Heeramonnee Barmoneah, 12 Moo., I. A., 81, referred to ...	242
Sri Girdhariji Maharaj v. Chote Lal, I. L. R., 20 All., 248, referred to ...	341, 345
Sriramulu v. Ramayya, I. L. R., 3 Mad., 15, followed ...	428, 432
Sukru v. Tafazzul Husain Khan, I. L. R., 16 All., 301, followed ...	189
Sukhdeo Singh v. Bahadur Singh, Weekly Notes, 1904, p. 10, distinguished ...	458
Sukru Dasadh v. Ram Pergash Singh, I. L. R., 30 Calc., 443, followed... ..	298
<b>T.</b>	
Tajjo Bibi v. Bhagwan Prasad, I. L. R., 16 All., 295, referred to ...	316
Tara Chand v. Imdad Husain, I. L. R., 18 All., 325, approved ...	523
Tarsi Ram v. Man Singh, I. L. R., 8 All., 492, followed... ..	578
<b>U.</b>	
Udit Narain v. Jagannath, 1 All., I. J. Rep., 15, referred to ...	629
Umersey Premji v. Shamji Kanji, I. L. R., 13 Bom., 119, followed ...	461
<b>V.</b>	
Valiya Kesava Vadhyar v. Suppaunair, I. L. R., 2 Mad., 308, followed... ..	199
<b>W.</b>	
Watson & Co. v. Ramchand Dutt, I. L. R., 18 Calc., 10, referred to ...	154
<b>Y.</b>	
Young & Co. v. The Mayor & Corporation of Royal Leamington Spa., L. R., 8 App. Cas., 517, followed ... ..	594
<b>Z.</b>	
Zapir Hasan v. Sundar, I. L. R., 22 All., 199, followed... ..	68

# GENERAL INDEX OF CASES REPORTED IN THIS VOLUME.

	Page.
ABANDONMENT of portion of claim, <i>See</i> Act No. VII of 1870, section 10 ... ..	151
ACKNOWLEDGMENT, <i>See</i> Act No. II of 1899, schedule I, article 1 ...	84
ACQUIESCENCE, <i>See</i> Land-holder and tenant ... ..	338
ACQUITTAL, <i>See</i> Criminal Procedure Code, section 439 ... ..	359
ACTS—1860—XLV (INDIAN PENAL CODE), SECTION 409, <i>See</i> Criminal Procedure Code, section 234 ... ..	69
SECTION 170— <i>Personating a public servant — Definition.</i> Held that to constitute the offence provided for by section 170 of the Indian Penal Code it is not necessary that the act done or attempted to be done should be such an act as might legally be done by the public servant personated. <i>Queen-Empress v. Wazir Jan</i> , I. L. R., 10 All., 58, referred to.	
Emperor v. Aziz-ud-din, I. L. R., 27 All. ... ..	294
SECTION 183— <i>Attachment — Warrant not in the possession of the amin at the time of making the attachment—Lawful authority.</i> It is the intention of the law that when a public servant attaches property under a warrant in execution of a decree, he must have the warrant with him, otherwise the taking of the property is not lawful. <i>Empress of India v. Amar Nath</i> , I. L. R., 5 All., 311, referred to.	
Emperor v. Ganeshi Lal, I. L. R., 27 All. ... ..	258
SECTION 184— <i>Act (Local) No. II of 1901 (Agra Tenancy Act), section 134 — Distraint — Sale adjourned owing to absence of bidders — Obstruction to sale on adjourned date.</i> The law as laid down in Chapter IX of the Agra Tenancy Act, 1901, does not authorize the adjournment of a sale of distrained property owing to the absence of bidders. Hence where for this reason an amin adjourned a sale and fixed a fresh date, and obstruction was offered to the sale so adjourned, it was held that the persons so obstructing the sale could not be convicted under section 184 of the Indian Penal Code.	
Emperor v. Tara Singh, I. L. R., 27 All. ... ..	480
SECTION 186— <i>Act No. VIII of 1878 (Northern India Canal and Drainage Act), sections 45 and 47 — Mode of collection of canal dues — Distraint.</i> Where under a written order signed by a Tahsildar the Naib Nazir was directed to realize certain canal dues, and he, on attempting to do so by attachment and sale of the defaulter's property, was resisted by the owners of the property, it was held that the conviction of the persons offering resistance under section 186 of the Indian Penal Code was good. The Tahsildar's order, though not of a formal nature, was sufficient evidence that the Naib Nazir was acting as a public servant in the	

discharge of his duty. *Held* also that the appointment of lambar-dars does not preclude the Revenue authorities, if they think fit, from realizing canal dues from the persons by whom the dues are actually payable. *Queen-Empress v. Poomalai Udayan I. L. R.*, 21 Mad., 290, referred to.

Emperor v. Abdullah, I. L. R., 27 All. ...

499

ACTS—1860—XIV (INDIAN PENAL CODE), SECTIONS 225B, 353 — *Rescue from lawful custody—Legality of warrant—Civil Procedure Code, sections 82, 174.* An Assistant Collector issued warrants for the arrest of certain witnesses, for whose attendance summonses had been issued, but who had not appeared in obedience thereto. The serving officer had not been able to effect personal service of the summonses, but had affixed copies to the houses of the persons to be served. The Court previous to issuing warrants did not comply with the provisions of section 82 of the Code of Civil Procedure, though it was apparently of opinion that there had been due service of the summonses. The officers charged with the execution of the warrants arrested one of the witnesses, but they were attacked by N and others, and the man they had arrested was rescued. N was convicted under sections 225B and 353 of the Indian Penal Code. *Held* that even if section 225B was not applicable, the conviction under section 353 of the Code was perfectly justified.

Emperor v. Narbadeshwar, I. L. R., 27 All. ...

491

SECTION 405 — *Criminal breach of trust—“Property”—Cancelled cheques.* *Held* that a cancelled cheque falls within the meaning of the term “property” as used in section 405 of the Indian Penal Code, even if it is worth no more than the value of the paper upon which it is written. In the matter of a conviction for criminal breach of trust the question of the value of the property in respect of which the breach of trust is committed is, except so far as section 95 of the Code is concerned, quite immaterial.

Emperor v. Maula Bakhsh, I. L. R., 27 All. ...

28

SECTION 405 — *Criminal breach of trust—Definition.* A clerk in a record-room made over a document forming part of a record in his custody to a person who was entitled to the document, but who would otherwise have had to present an application on stamped paper in order to secure its return in a legal manner. *Held* that the clerk was under the above circumstances rightly convicted under section 409 of the offence of criminal breach of trust by a public servant.

Emperor v. Ganga Prasad, I. L. R., 27 All. ...

260

SECTION 415 — *Cheating—Definition—Sale of immovable property without mentioning incumbrances.* The vendor of immovable property cannot be convicted of cheating because he omits to mention that there is an incumbrance on the property, unless it is shown either that he was asked by the vendee whether the property was incumbered and said it was not, or that he sold the property on the representation that it was unincumbered. *Morsfall v. Thomas*, 31 L. J., Ex., 322, referred to.

Emperor v. Bishan Das, I. L. R., 27 All. ...

561

SECTIONS 417, 420 — *Cheating—Definition—Pre-emption—Failure to disclose existence of mortgage subsequent to purchase.* The vendee defendant in a suit for pre-emption compromised the suit, the plaintiff agreeing to pay a certain sum in cash and to discharge certain incumbrances



on the property in suit. It was subsequently discovered that the vendee had, after his purchase but before suit, mortgaged the property which was the subject of the suit for pre-emption.

*Held* that the vendee could not, on account merely of his omission to disclose the existence of this subsequent mortgage, be held guilty of the offence of cheating.

Gendan Lal v. Abdul Aziz Khan, I. L. R., 27 All. ... 312

ACTS—1860—XIV (INDIAN PENAL CODE), SECTION 434—*Boundary marks fixed by authority of public servant—Definition—Criminal Procedure Code, section 145.*] A Magistrate making an order under section 145 has no authority to cause the property which is subject of a dispute likely to occasion a breach of the peace to be demarcated by boundary pillars, and consequently, if he does so, a person destroying or removing such boundary pillars is not liable to conviction under section 434 of the Indian Penal Code.

Emperor v. Rameshar, I. L. R., 27 All. ... 300

SECTION 441—*Criminal trespass—Definition—Occupation by zamindars of house left by deceased tenant.*] A tenant of village S, who owned a house there but was temporarily residing in a neighbouring village, died, and on his death the zamindars of S, took possession of the house in S, adversely to the tenant's widow, alleging that they were entitled to it. *Held* that the action of the zamindars could not be taken as amounting to criminal trespass within the meaning of section 441 of the Indian Penal Code. *Emperor v. Jungi Singh*, I. L. R., 26 All., 194, referred to.

Emperor v. Buzid, I. L. R., 27 All. ... 298

—1861—V (POLICE ACT), SECTION 4(2)—*Criminal Procedure Code, section 195—Sanction to prosecute—Sanction to prosecute given by the District Magistrate as head of the Police—Revision.*] *Held* that the High Court has no power to interfere in revision where a District Magistrate has granted sanction for a prosecution under section 195 of the Criminal Procedure Code acting therein as head of the Police of the district. *Ramaswamy Iyler v. Queen-Empress*, I. L. R., 27 Cal., 452, dissented from.

Emperor v. Shib Singh, I. L. R., 27 All. ... 292

—1867—III (GAMBLING ACT), SECTION 1—*Common gaming house—Definition—Profit derived from odds in favour of the bank.*] *Held* that a house was none the less a "common gaming house" within the meaning of section 1 of Act No. III of 1867 because the profit of the owner, occupier or keeper of the house was derived, not from payments made for the use of the house or the instruments of gaming, but from the game itself, by reason of the odds being always in favour of the bank.

Emperor v. Abdul Sattar, I. L. R., 27 All. ... 567

—1869—I (OUDH ESTATES), SECTION 2—*Succession under will taking effect before Act came into force—"Legatee" of a taluqdar—Surrender of grant by taluqdar and acceptance of sanad on new terms—Power of taluqdar—Power of Government to change nature of sanad—Act No. XV of 1895 (Crown Grants Act), section 3—Privy Council, discretion of—to allow new case to be set up in appeal.*] A person who succeeded to a taluq in 1865, and therefore before the passing of the Oudh Estates Act (I of 1869), under a will of the preceding taluqdar, is not the legatee of a taluqdar within the meaning of the Act. *Balraj Kunwar v. Rao Jagatpal Singh*, I. L. R., 31-I. A., 132; I. L. R., 26 All., 393, followed.



An estate in Oudh was settled with a taluqdar in 1859 and a *sanad* was granted to him under which the estate descended to the grantee and his heirs without indication of the line of inheritance. To the heir who succeeded him as taluqdar was granted in 1861, in substitution of the former one, a *sanad* under which the taluq descended to him and his nearest male heir by the rule of primogeniture. The Lower Courts held that the second *sanad* could not, even if proved, operate to substitute the line of descent prescribed by it for the line prescribed by the former *sanad*, and they decided the case on other grounds. *Held* by the Judicial Committee, who found that the second *sanad* and its terms were proved, that the taluqdar succeeding as heir had power to surrender the estate conveyed by the old *sanad*. When he succeeded as heir he became absolutely entitled by inheritance to everything that passed under the earlier grant, and there was nothing to prevent his entering into an arrangement with the Government to surrender it in consideration of a re-grant of the same estate on new terms. To such a transaction an objection that the Government having already granted the estate in 1859 to the former taluqdar and his heirs had nothing left to grant to the succeeding taluqdar would not apply; and the Government therefore on its surrender had power to grant the same estate under the new *sanad*.

Section 3 of the Crown Grants Act (XV of 1893) which made valid "all provisions, restrictions, conditions, and limitations ever, contained in any grant or transfer" made by Government or under their authority, "any rule of law, statute or enactment of the Legislature to the contrary notwithstanding" was held by the Judicial Committee to remove the force of an objection that no executive act of the Government could, in or after 1861, have created an estate descendible by any rule of inheritance other than that laid down by law, which in this case was the Hindu law.

The above case was allowed to be set up on appeal to the Privy Council though it had not been made in the written statement, nor raised by any specific issue, where the issues as settled were sufficiently wide to cover it, and all parties had been aware of the importance of the primogeniture *sanad* if it could be shown to have been granted and its contents could be ascertained, and were therefore not taken by surprise by the way in which the case was presented on appeal, so that no injustice could be done by disposing of the appeal upon it.

Sheo Singh v. Raghubans Kunwar, I. L. R., 27 All. ...

634

ACTS—1870—VII (COURT FEES ACT), SECTION 7, IX; SCHEDULE I—*Court fee—Suit for redemption of mortgage—Appeal in respect of a specified portion of the sum declared payable for redemption.* In a suit for the redemption of a mortgage the plaintiff obtained a decree for redemption conditional on the payment by him of a sum fixed by the decree. The plaintiff appealed upon the ground that such sum was in excess by a specified amount of the sum rightly payable by him for redemption. *Held* that the court-fee payable on the memorandum of appeal was to be calculated according to the sum which the appellant claimed to have deducted from his decree; and not, as in the case of a suit for redemption, according to the principal sum secured by the mortgage. *Pirbhoo Narain Singh v. Sita Ram*, I. L. R., 13 All., 94, *Quoad hoc* dissented from.

Nopal Rai v. Debi Prasad, I. L. R., 27 All. ...

447

SECTION 10—*Court fee—Abandonment of portion of claim in respect of which the court-fee was deficient—Dismissal of suit.* When a plaintiff in the initial

stage of the litigation abandons a portion of his claim, he is not compellable to pay court fees in respect of the portion abandoned under penalty of having the whole of his suit dismissed.

Ram Prasad v. Bhiman, I. L. R., 27 All. ... 151

ACTS—1870—VII (COURT FEES ACT), SECTION 10(2)—*Court fee—Nett profits or market value wrongly estimated—Limitation.* Where action is taken by a Court under section 10 of the Court Fees Act, 1870, the Court is not bound, as in the case of action taken under section 54 of the Code of Civil Procedure, to fix a time within the period of limitation for the suit within which the deficiency in the court fee must be made good, this section applying to a different stage of the suit from that contemplated by section 54 of the Code of Civil Procedure.] *Paliya Kasava Fadhyar v. Suppunnair*, I. L. R., 2 Mad., 808, followed. *Jainti Prasad v. Bachu Singh*, I. L. R., 15 All., 65, and *Balkaran Rai v. Govind Nath Tiwari*, I. L. R., 15 All., 129, distinguished. *Durga Singh v. Risheshwar Dayal*, I. L. R., 24 All., 218, referred to.

Babu Lal v. Asi Kunwar, I. L. R., 27 All. ... 197

SECTION II, SCHEDULE II,  
ARTICLE 17 (vi)—*Court fee—Suit for sale on a mortgage—Appeal—Claim for future interest.* The plaintiffs, in whose favour a decree for sale on a mortgage had been passed allowing interest up to the date fixed by the decree for payment of the mortgage money, appealed on the ground that interest should have been allowed up to the date of realization. Held that the proper court fee payable on the memorandum of appeal was ten rupees, as provided by article 17 (vi) of the second schedule to the Court Fees Act, 1870. *Krishnarao v. Antaji Virapuksha*, 12 Bom., H. C. Rep., 227, followed.

Bhawani Prasad v. Kutub-un-nissa Bibi, I. L. R., 27 All.... 559

SECTION 17 — *Court fee — “Distinct subjects”—Pre-emption—Suit for pre-emption of two villages out of a larger number conveyed by the same sale deed.* The plaintiffs sued for pre-emption of shares in two villages out of a larger number sold in one and the same transaction. They paid court fees on their plaint calculated on five times the aggregate amount of the Government revenue payable by each of the two villages. Held that this was a proper mode of calculation. The two villages were not “distinct subjects” within the meaning of section 17 of the Court Fees Act, 1870, and court fees were not therefore leviable in respect of each village separately. *Chamaili Rani v. Ram Dai*, I. L. R., 1 All., 552, *Mul Chand v. Shih Charan Lal*, I. L. R., 2 All., 676, and *Sakru v. Tafazzul Husain Khan*, I. L. R., 16 All., 401, followed.

Durga Prasad v. Purandar Singh, I. L. R., 27 All. ... 186

SECTION 28 — *Civil Procedure Code, section 54—Valuation of suit—Limitation—Rules of Court of the 4th April 1894, Rule 12—Duties of Munsarim.* When reporting as to the sufficiency of the stamp on a plaint it is not necessary for the Munsarim to do more than ascertain whether the plaint is sufficiently stamped according to the plaintiff's valuation of the subject-matter of the suit; his duty does not extend to an examination of the correctness of the plaintiff's valuation.

Hence where a plaint was correctly stamped according to the plaintiff's valuation, and so reported by the Munsarim, but it was afterwards discovered—when the period of limitation for the suit had expired—that the plaintiff's valuation was wrong and the

	Page.
plaint was in fact insufficiently stamped, it was held that the suit was barred by limitation. <i>Muhammad Ahmad v. Muhammad Siraj-ud-din</i> , I. L. R., 23 All., 423, followed.	
<i>Chatarpal v. Jagram</i> , I. L. R., 27 All. ....	411
ACTS—1872—I (INDIAN EVIDENCE ACT), SECTION 92— <i>Construction of document—Evidence inadmissible to show that a document purporting to be a sale-deed is in reality a deed of gift.</i> Held that extrinsic evidence is not admissible for the purpose of showing that a document which purports to be, and on the face of it is, a deed of sale is in reality a deed of gift. <i>Sah Lal Chand v. Indarjit</i> , I. L. R., 22 All., 371, and <i>Balkishen Das v. Legge</i> , I. L. R., 22 All., 149, referred to.	
<i>Faiz-un-nissa v. Hanif-un-nissa</i> , I. L. R., 27 All. ....	612
SECTION 92, PROVERSO (1), <i>See Act No. IX of 1872, section 24</i> ...	266
SECTION 102— <i>Evidence—Burden of proof—Bond reciting receipt of consideration—Subsequent denial of receipt of consideration.</i> Where execution of a bond is admitted and the bond contains an admission that consideration has passed, it is for the executant to get rid of the admission which he has made in the bond. It is not enough for him to prove that prior to the institution of a suit on the bond he denied receipt of consideration, even if such denial was made before the registering officer.	
<i>Mahabir Prasad Rai v. Bishen Dayal</i> , I. L. R., 27 All. ....	71
SECTION 155— <i>Impeachment of credit of witness—Proof of previous statement of witness to the Police—Criminal Procedure Code, section 162.</i> Held that for the purpose of impeaching the credit of a witness who gives evidence in favour of an accused person it is not illegal to examine the Police Officer who investigated the case with the object of showing that the witness made a different and inconsistent statement before him. <i>Queen-Empress v. Sitaram Tithal</i> , I. L. R., 11 Bom., 657, and <i>Queen-Empress v. Madho</i> , I. L. R., 15 All., 25, followed.	
<i>Emperor v. Jagardeo Pande</i> , I. L. R., 27 All. ....	469
—1872—IX (INDIAN CONTRACT ACT), SECTION 12— <i>Unsoundness of mind—Suit to set aside mortgages on the ground of insanity of mortgagor at the time of execution—Decision on case not made by the evidence—Different types of insanity—Concurrent decisions on facts.</i> In suits to set aside mortgages on the ground that the mortgagor was of unsound mind at the time of their execution, the plaintiff's witnesses gave evidence which showed insanity of a violent type, but their evidence was not believed by either of the Courts below. Held that it was not allowable for the Court of first instance to substitute for the case of insanity advanced by the plaintiff a case of weakness of mind and consequent helplessness, when the type of insanity connoted in the evidence was something quite different, and on that ground to give the plaintiff partial relief.	
There being concurrent decisions that there was no insanity of the type set up by the plaintiff, and it not being shown that there was any want of consideration for the mortgages, the decision of the Court of the Judicial Commissioner of Oudh dismissing the suits was upheld.	
<i>Durga Bakhsh Singh v. Muhammad Ali Beg</i> , I. L. R., 27 All. ....	1

Page.

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTION 23—*Act No. II of 1882, section 82—Agreement opposed to public policy—Purchase of land by public officer benami—Representative debarred from claiming benefit of purchase.* When a public officer enters into a contract which is unenforceable as being opposed to public policy, persons deriving title through him are in no better position than himself, nor is their situation in any way affected by the provisions of the Indian Trusts Act, 1882. *Shiam Lal v. Chhakti Lal*, I. L. R., 22 All., 220, approved.

*Sheo Narain v. Mata Prasad*, I. L. R., 27 All. ... 73

SECTION 24—*Act No. I of 1872 (Indian Evidence Act), section 92, proviso (1)—Contract—Unlawful consideration—Pleadings.* When it is brought to the notice of a Court that the consideration for a contract which it is asked to enforce is, in whole or in part, an unlawful consideration, such Court is bound to give effect to the fact thus brought to its notice, notwithstanding that the contract may appear upon the face of it to be a perfectly legal contract, and that the unlawfulness of the consideration therefore was never pleaded by the defendant. *Holman v. Johnson*, Cowper, 341, *Scott v. Brown, Doering, McNab & Co.*, L. R., 1892, 2 Q. B. D., 724, *Geddes v. Royal Exchange Assurance Corporation*, L. R., 1900, 2 Q. B., 214, and *Benyon v. Nettlefold*, 3 MacN. and G., 94, referred to.

In India, adultery being an offence against the criminal law, cohabitation past or future, if adulterous, is not merely an immoral but an unlawful consideration. *Man Kuar v. Jasodha Kuar*, I. L. R., 1 All., 478, and *Dhiraj Kuar v. Bikramajit Singh*, I. L. R., 3 All., 787, referred to.

*Hill v. Clarke*, I. L. R., 27 All. ... 266

SECTIONS 65, 70 AND 72, See Act No. XV of 1883, section 40 ... 592

SECTION 230—*Undisclosed principal—Hindu law—Joint Hindu family—Contract made with managers of ancestral business—Parties to suit.* Where a contract is entered into on behalf of a joint family business by the managing members of the firm in their own names it is not necessary that any members of the joint family other than those who entered into the contract should be parties to a suit brought thereon; the managing members are in the position of agents for undisclosed principals. *Bungsee Singh v. Soodist Lal*, I. L. R., 7 Cal., 733, and *Agacio v. Forbes*, 14 Moo., P. C., 160, followed.

*Gopal Das v. Badri Nath*, I. L. R., 27 All. ... 861

1873—VIII (NORTHERN INDIA CANAL AND DRAINAGE ACT), SECTIONS 45 AND 47, See Act No. XLV of 1860, section 186 ... 499

1876—XVIII (ODDH LAWS ACT), See Bengal Regulation, No. XI of 1825, section 4 ... 655

1877—I (SPECIFIC RELIEF ACT) SECTION 21—*Civil Procedure Code, section 523—Arbitration—Agreement to refer made pending a suit—Such agreement a bar to the continuance of the suit.* Where parties to a suit have agreed to refer the matters in dispute between them in such suit to arbitration, such an agreement ousts the jurisdiction of the Court to proceed with the suit, whether it is filed in Court under the provisions of section 523 of the Code of Civil Procedure or not. *Salig Ram v. Jhunna Kuar*, I. L. R., 4 All., 546, *Sheoambar v. Deodat*, I. L. R., 9 All., 168, and *Shib Lal v. Hira Lal*, Weekly Notes, 1888, p. 133, followed.

*Sheo Dat v. Sheo Shankar Singh*, I. L. R., 27 All. ... 53

ACTS—1877—I (SPECIFIC RELIEF ACT), SECTION 22—*Specific performance of contract—Discretion of Court—Delay in applying to Court for relief.* Great delay on the part of the plaintiff in applying to the Court for specific performance of a contract of which he claims the benefit is of itself a sufficient reason for the Court in the exercise of its discretion to refuse relief. *Miswond v. The Earl of Thanet*, 6 Ves. 720n., referred to.

Nawab Begum v. Croet, I. L. R., 27 All. ... 678

SECTION 42—*Declaratory decree—Discretion of Court—Joint Hindu family—Non-joinder of parties.* Where some of the descendants of a judgment-debtor under two Rent Court decrees filed a suit in a Civil Court, asking for a declaration that the joint ancestral family property was not liable, after the decease of the judgment-debtor, to be taken in execution of such decrees, and did not make parties to the suit the two sons of the judgment-debtor, it was held that the Court exercised a right discretion under section 42 of the Specific Relief Act, 1877, in refusing to grant a declaratory decree.

Maharaja of Benares v. Ramji Khan, I. L. R., 27 All. ... 138

SECTION 42—*Suit by heir presumptive against life tenant to restrain waste by life tenant—Injunction.* There is nothing in law to prevent the heir presumptive, that is, the person who would be entitled to possession if the life tenant were to die at the moment of suit, from suing for a declaration that as against the life tenant he is entitled as next reversioner, and for an injunction restraining the life tenant from wasting the property in suit. *Rani Anand Koer v. The Court of Wards*, I. R., 8 I. A., 14, followed. *Gangayya v. Mahalakshmi*, I. L. R., 10 Mad., 90, referred to. *Greeman Singh v. Wahari Lall Singh*, I. L. R., 8 Cal., 12, discented from.

Manmatha Nath Biswas v. Rohilli Moni Dasi, I. L. R., 27 All. ... 406

III (INDIAN REGISTRATION ACT), SECTIONS 3 AND 17—*Act No. IV of 1882, section 107—Immovable property—Definition—Lease of right to receive market dues.* Held that the right to collect market dues upon a given piece of land is a benefit to arise out of land within the purview of section 3 of the Indian Registration Act, 1877. A lease, therefore, of such right for a period of more than one year must be made by registered instrument.

Sikandar v. Bahadur, I. L. R., 27 All. ... 462

SECTION 17—*Mortgage—Release of part of mortgaged property on part payment of mortgage debt effected by endorsement on bond—Registration.* A portion of certain property, the subject of a mortgage, was purchased by a stranger to the bond who paid off a portion of the mortgage debt, and on the bond the fact of payment together with the release of a specified portion of the mortgaged property was endorsed. Held that such an endorsement did not require registration. *Gurdial Mal v. Jankri Mal*, I. L. R., 7 All., 820, followed.

Ganga Bakhsh v. Jagannath, I. L. R., 27 All. ... 806

SECTION 17—*Act No. IV of 1882 (Transfer of Property Act), section 54—Registration—Assignment of arrears of profits—Lambardar and co-sharer.* A deed of assignment of profits already due by a lambardar to a



co-sharer does not require to be registered, either by virtue of section 17 of the Indian Registration Act, 1877, or by virtue of section 54 of the Transfer of Property Act, 1882.

Dafnodar Das v. Girdhari Lal, I. L. R., 27 All. ... 564

ACTS—1877—XV (INDIAN LIMITATION ACT), SECTION 7—*Minority—Death of decree-holder leaving a minor representative surviving him—Limitation.*] Held that the person whose minority would, under section 7 of the Indian Limitation Act, 1877, save the operation of limitation must be the person who was entitled to bring the suit or make the application on the date from which the period of limitation for the particular suit or application was to be reckoned. *Lachman Prasad v. Bhagwan Singh*, Weekly Notes, 1886, p. 49, followed.

Bhagat Bihari Lal v. Ram Nath, I. L. R., 27 All. ... 704

SECTIONS 7 AND 8—*Execution of decree—Limitation—Minority.*] Held that section 7 of the Indian Limitation Act, 1877, applies even where some only and not all of the judgment-creditors are affected by a legal disability. *Zamir Hasan v. Sundar*, I. L. R., 12 All., 64, followed.

Jiwan Ram v. Ram Sarup Ram, I. L. R., 27 All. ... 67

SECTION 18; SCHEDULE

II, ARTICLES 10 AND 120—*Limitation—Pre-emption—Sale fraudulently disguised as a gift—Suit for pre-emption alleging date on which fraud became known to plaintiff—Burdens of proof.*] On the 11th of September 1901, G. executed in favour of M. what purported to be a deed of gift of certain property. M., after an unsuccessful attempt to obtain mutation of names, filed a suit in the Civil Court for a declaration that the transaction was a gift and for possession of the property, but stated that he was willing to pay the balance of the consideration money if the transaction was found to be a sale. On the 12th of December 1902 a consent decree was passed whereby the deed of gift was declared lawful (*jaiz*), and possession was decreed in favour of M. On the 5th of February 1903 S. brought a suit for pre-emption against G. and M., alleging that the transaction was a sale fraudulently disguised as a gift, and that the fraud had come to his knowledge on the 14th of December 1902. Held that the suit was within time. It lay on the defendant to show that the plaintiff had knowledge of the fraud practised on him at a time which was too remote to allow him to bring the suit, and this he had failed to do. *Rahimbhoy Habibhoy v. Turner*, I. L. R., 17 Bom., 341, referred to.

Sukh Lal v. Madhuri Prasad, I. L. R., 27 All. ... 540

SECTIONS 19, 20 AND

21; SCHEDULE II, ARTICLE 179, See Civil Procedure Code, section 206 ... 575

SCHEDULE II, ARTICLE

12, See Civil Procedure Code, sections 278 and 283 ... 464

SCHEDULE II, ARTI-

CLES 124 AND 144, See Trust ... 518

SCHEDULE II, ARTICLE

141, See Hindu law ... 494

SCHEDULE II, ARTICLE

144—*Limitation—Adverse possession—Mortgage—Possession adverse as against mortgagee not necessarily adverse as against mortgagor.*] Possession of mortgaged property obtained by ouster of a mortgagee in possession is not necessarily adverse to the mortgagor also, for the reason that such possession, so far as the

	Page
mortgagor is concerned, cannot become adverse until the mortgagor becomes entitled to immediate possession. <i>Chato v. Jani</i> , I. L. R. 18 Bom. 51, and <i>Rajoy Chander Banerjee v. Kally Prasanna Mookerjee</i> , I. L. R. 4 Cal. 327, referred to.	
Muhammad Hussain v. Mal Chand, I. L. R. 27 All. ....	395
ACTS—1877—XV (INDIAN LIMITATION ACT), SCHEDULE II, ARTICLE 178. See Civil Procedure Code, section 244 ....	485
..... SCHEDULE II, ARTICLE 178. See Act No. IV of 1882, sections 86 and 87 ....	501
..... SCHEDULE II, ARTICLES 178 AND 179. See Act No. IV of 1882, sections 88 and 89 ....	625
..... SCHEDULE II, ARTICLE 179. See Execution of decrees ....	334
..... SCHEDULE II, ARTICLE 179. Execution of decrees—Limitation—Application "in accordance with law"—Application which could not legally be granted—Act No. 11 of 1842 (Transfer of Property Act), section 90.] A decree which was partly a decree under section 88 and partly a decree under section 90 of the Transfer of Property Act, 1882, was passed on the 2nd of December 1885. The decree-holders having brought to sale a portion of the mortgaged property, applied, on the 23rd of November 1897, for execution against the non-hypothecated property of the mortgagor. The judgment-debtor objected that this application was premature, as the whole of the mortgaged property had not been sold. This objection was rejected by two Courts, but was allowed by the High Court in second appeal. On the 26th of August 1901 the decree-holders applied for sale of the remainder of the mortgaged property. Held that this application was barred by limitation. <i>Chattar v. Nawal Singh</i> , I. L. R. 12 All. 64, followed.	
Munawar Hussain v. Jani Bijai Shankar, I. L. R. 27 All. ....	619
—1881—XII (N.W. P. RENT ACT), SECTION 93—Act (Local) No. II of 1901 (Agra Tenancy Act), section 201—Finding of Court of Revenue as to title—Subsequent suit in Civil Court—Estoppel.] The fact that a question of title has been decided by a Court of Revenue in the course of a suit exclusively triable by such a Court, although such decision was necessary to the determination of that suit, will not preclude the subsequent trial thereof by a Civil Court. <i>Shen Narain Rai v. Parmeshwar Rai</i> , I. L. R. 18 All. 270, and <i>Ashraf-un-nissa v. Ali Ahmad</i> , I. L. R. 26 All. 601, referred to.	
Inayat Ali Khan v. Murad Ali Khan, I. L. R. 27 All. ....	569
—1882—II (INDIAN TRUSTS ACT), SECTION 82, See Act No. IX of 1872, section 23 ....	78
—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 54, See Act No. III of 1877, section 17 ....	564
95—Redemption of mortgage—Clay on equity of redemption—Parties to suit for redemption—Effect of payment of mortgage money into Court.] After the execution of a usufructuary mortgage the mortgagor executed a bond, which, in addition to the usual stipulation for re-payment of the money secured thereby, contained a covenant to the effect that the mortgaged property should not be redeemed until the principal money and interest due under the bond had been paid off.	



*Held* that such a provision amounted to a clog or fetter on redemption, placing in the way of the mortgagor a bar to the exercise of the right of redemption which the law gave him, and was therefore a provision not to be enforced. *Shoo Shankar v. Parma Mahlon*, I. L. R., 26 All., 559, followed.

*Held* also that where the purchaser of part of the equity of redemption comes into court seeking to redeem the whole mortgage, and pays into court the entire amount due at the time upon that mortgage, the rights of a purchaser of another portion of the equity of redemption claiming only to redeem his proportionate share in the mortgage, cannot be dealt with in that suit, for upon payment by the plaintiff of the full amount due the mortgage has ceased to exist.

*Rugad Singh v. Sat Narain Singh*, I. L. R., 27 All. ... 178

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 68—*Mortgage—Right of mortgagee to sue for mortgage money.*] Where on the execution of a usufructuary mortgage the mortgagor fraudulently suppressed the fact that there was outstanding against the mortgaged property a decree for sale on a prior mortgage, and this decree was subsequently put into execution, it was held that the mortgagee was entitled, under section 68(c) of the Transfer of Property Act, 1882, to sue the mortgagor for the mortgage-money.

The mortgage in question contained a covenant that if any "khalal" occurred, the mortgagor would be responsible and would repay the mortgage-money.

*Held* that the expression "khalal" could not be confined to an unforeseen event or accident; but would include the consequences of conduct such as that of which the mortgagor had been guilty.

*Ahmad-ul-lah Khan v. Salar Bakhsb*, I. L. R., 27 All. ... 488

SECTION 72 —  
*Mortgage—Prior and subsequent incumbrances—Rights of usufructuary mortgagee who satisfies a decree on a prior mortgage of the property mortgaged to him.*] *Held* that a usufructuary mortgagee who satisfies a decree for sale on a prior mortgage affecting the property mortgaged to him is entitled to retain possession until the amount so paid as well as the amount due in respect of his own mortgage has been realized.

*Abdul Qayyum v. Sadr-ud-din Ahmad*, I. L. R., 27 All. ... 408

SECTIONS 74 AND  
86, *See* Civil Procedure Code, section 244 ... 325

SECTION 82 —  
*Mortgage—Contribution—Valuation of properties for the purpose of ascertaining their liability to contribution.*] In estimating for the purpose of giving effect to a claim for contribution—the respective values of two or more properties, the subject of a mortgage, the time to be regarded is the date of the execution of the mortgage in virtue of which contribution is claimed.

*Mardan Singh v. Thakur Shoo Dayal*, I. L. R., 27 All. ... 549

SECTION 85 —  
*Parties—Mortgage of mortgagee rights—Suit by sub-mortgagee for sale of the interest of his mortgagor.*] *Held* that in a suit by a sub-mortgagee to recover a debt secured by a mortgage of the defendant's rights as mortgagee the defendant's mortgagor is not a necessary party. In such a suit the plaintiff cannot bring

to sale the mortgagee rights of the defendant. *Ganga Prasad v. Channi Lal*, 1. L. R., 18 All., 113, referred to.

Ram Jatan Rai v. Ramhit Singh, 1. L. R., 27 All. ... 511

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 85—*Non-joinder of necessary parties—Civil Procedure Code, section 32.* Even if the non-joinder as a party defendant of a person who ought, in view of section 85 of the Transfer of Property Act 1882, to have been made a party to a suit for sale on a mortgage is by itself a defect fatal to the suit, such defect is cured if the Court acting under section 32 of the Code of Civil Procedure adds such person as a defendant. *Kali Charan v. Ahmad Shah Khan*, 1. L. R., 17 All., 48, referred to. *Salig Ram v. Har Charan Lal*, 1. L. R., 13 All., 548, considered.

Kundan Lal v. Faqir Chand, 1. L. R., 27 All. ... 75

SECTIONS 86 AND 87—*Mortgage—Suit for foreclosure—Appeal—Application for order absolute for foreclosure—Limitation—Execution of decree—Act No. XV of 1877 (Indian Limitation Act), Schedule II, Article 178.* The plaintiff sued for foreclosure of a mortgage which purported to comprise five villages. On the 19th of June 1899 he obtained a decree, but it was in respect of three villages only. As to these the decree provided for foreclosure in default of payment by the defendants of a sum of Rs. 39,584-6-8 on or before the 19th of December 1899. The plaintiff did not ask for an order absolute for foreclosure in respect of this decree, but appealed against the dismissal of his suit as regards the two remaining villages. This appeal was dismissed on the 4th of August 1902. No part of the mortgage-money was paid; and on the 15th of September 1903, the decree-holder applied under section 87 of the Transfer of Property Act, 1882, for an order absolute for foreclosure. Held that the decree-holder's application was not barred by limitation. The nature of proceedings for foreclosure is such that a mortgage must be foreclosed as a whole or not at all. The decree-holder in this case could not have applied for an order absolute for foreclosure on the decree of the 19th of June 1899, without giving up his appeal from that decree. *Raham Illahi Khan v. Ghasita*, 1. L. R., 20 All., 375, and *Poresh Nath Mojumdar v. Ramjodu Mojumdar*, 1. L. R., 16 Cal., 246, referred to. *Oudh Behari Lal v. Nageshar Lal*, 1. L. R., 13 All., 278, discussed and doubted. *Mul Chand v. Mukta Pal*, Weekly Notes, 1896, p. 100, and *Mahabir Prasad v. Sital Singh*, 1. L. R., 19 All., 520, referred to.

Sham Sundar v. Muhammad Iftikhar Ali, 1. L. R., 27 All. ... 501

SECTIONS 88 AND 89—*Civil Procedure Code, section 235—Execution of decree—Limitation—Act No. XV of 1877 (Indian Limitation Act), schedule II, articles 178 and 179.* Held that an application, framed as an application under section 235 of the Code of Civil Procedure, for execution of a decree under section 88 of the Transfer of Property Act, being in substance, though not in form, an application for an order absolute under section 89 of the Act, is an application for execution made in accordance with law, and as such will give a fresh starting point for limitation. *Oudh Behari Lal v. Nageshar Lal*, 1. L. R., 13 All., 278, *Chunni Lal v. Harnam Das*, 1. L. R., 20 All., 302, *Ahmad Ali v. Naziran*, 1. L. R., 24 All., 542, and *Udit Narain v. Jagannath*, 1 All., L. J., Rep., 15, referred to.

Baldeo Prasad v. Ibn Haidar, 1. L. R., 27 All. ... 625

## ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 90—

**MORTGAGE—Suit for sale—Premature suit decreed in part on confession of judgment by some of the defendants—Subsequent suit for balance of the mortgage debt.]** In a usufructuary mortgage of a shop, a separate dwelling-house was hypothecated as collateral security. The dwelling-house was subsequently sold to third parties. Before the expiry of the term of the mortgage the mortgagee brought a suit to recover the mortgage debt with interest, and the cost of certain repairs to the shop, by sale of both the shop and the dwelling-house. This suit was decreed as against the representatives of the mortgagor, who confessed judgment, but dismissed as against the purchasers of the house as premature. After the expiry of the term of the mortgage, the plaintiff brought a second suit asking for sale of the dwelling-house. *Held* that this second suit was not barred. The defendants' purchasers, having formerly pleaded that the plaintiff's suit was premature, could not now plead that his present claim ought to have been included in it; and neither section 90 of the Transfer of Property Act, 1882, nor section 244 of the Code of Civil Procedure applied.

Ganga Ram v. Kanhuja Lal, I. L. R., 27 All. ... 254

SECTION 90, *See*

Act No. XV of 1877, schedule II, article 179 ... 619

## SECTION 91 (b)—

**Redemption of mortgage—Right of sub-mortgagee to redeem a prior mortgage.]** In 1884 G. and others, the owners of the mortgaged property, executed a usufructuary mortgage in favour of R. D. and others to secure a principal sum of Rs. 349. In the mortgage it was provided that the property might be redeemed in *Chait* of any year. In April 1900 the same mortgagors executed a further mortgage of the same property in favour of one B. L. to secure a principal sum of Rs. 839. This mortgage contained a provision that the mortgagee should get possession of the property after redeeming the earlier mortgage of 1884. In the following month B. L. sub-mortgaged the property in favour of R. S. and M. R. to secure a principal sum of Rs. 599. Of this sum Rs. 349-15 were left in the hands of the mortgagees to enable them to redeem the mortgage of 1884 and obtain possession of the mortgaged property; and in the deed the sub-mortgagor in express terms transferred his interest in the land, the subject-matter of the mortgage, and agreed that the sub-mortgagees should remain in possession of the land from 1308 to 1314 Fasli, paying rent therefor to the proprietors of the mahal. *Held* that the sub-mortgagees from B. L. were entitled to redeem the prior mortgage of 1884. *Ganga Prasad v. Chami Lal*, I. L. R., 18 All., 113, distinguished. *Misri Lal v. Abdul Aziz Khan*, Weekly Notes, 1901, p. 158, overruled. *Muthu Vijaya Raghunatha Ramachandra Vacha Mahali Thurai v. Venkatachallam Chetti*, I. L. R., 29 Mad., 35, and *Mata Din Kasadban v. Kazim Husain*, I. L. R., 13 All., 432, referred to.

Ram Subhag v. Nar Singh, I. L. R., 27 All. ... 472

## SECTION 99—Civil

**Procedure Code section 233 Mortgagee holding also a simple money decree against mortgagor—Transfer of decree—Rights of transferee.]** H., the holder of a usufructuary mortgage over the property of B., obtained against B. a simple money decree which had nothing whatever to do with the mortgage or the debt secured thereby. H. transferred this simple money decree to M. *Held* that there was nothing to prevent M. from bringing to sale in execution of this decree the property mortgaged by B. to H.

*Chundra Nath Dey v. Burroda Shoondury Ghose*, I. L. R., 22 Cal., 813, distinguished.

*Ranb Lal v. Manni Lal*, I. L. R., 27 All. ... 450

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 93—*Mortgage—Sale of equity of redemption by mortgagor—Purchase of equity of redemption by mortgagee in execution of a decree against mortgagor's vendee—Effect of such purchase—Suit by mortgagor's vendee for redemption—Parties.* The equity of redemption in certain mortgaged property was sold by the mortgagor to third parties. In execution of a decree for costs and mesne profits the mortgagee brought the equity of redemption in the hands of the purchasers to sale and purchased it himself. Years after this the purchasers of the equity sued to redeem the mortgaged property, treating the sale to the mortgagee as a nullity. They did not implead in this suit the representatives of the original mortgagee. *Held* that the suit must fail for want of proper parties. But in any case the purchase by the mortgagee of the equity of redemption was voidable only and not void, and could not after the lapse of some twenty years be impeached. *Tara Chand v. Imdad Hussain*, I. L. R., 14 All., 328, and *Mogon Pathuli v. Pakaran*, I. L. R., 22 Mad., 347, approved. *Khairaj Mal v. Daim*, I. L. R., 32 I. A., 23. *Bhagbhutti Das v. Shama-churn Bose*, I. L. R., Cal., 337. *Murtand v. Dhondo*, I. L. R., 22 Bom., 624, and *Shoodeni Tewari v. Ram Saran Singh*, I. L. R., 26 Cal., 164, referred to.

*Muhammad Abdul Iashid Khan v. Dilsukh Bai*, I. L. R., 27 All. ... 517

SECTION 107—*Lease of immovable property—Qabuliat not a lease.* Where a lease of immovable property is for a period of more than one year, it must be made by means of a duly executed and registered patta; such a lease cannot be created by or proved by the production of a qabuliat only. *Nand Lal v. Hanuman Das*, Weekly Notes, 1904, p. 46 referred to.

*Kashi Gir v. Jogendro Nath Ghose*, I. L. R., 27 All. ... 136

Act No. III of 1877, sections 3 and 17 ... SECTION 107, See 462

VI (INDIAN COMPANIES ACT) SECTIONS 58, 147 AND 169—*Order in the matter of the winding up of a Company by the Court—Appeal—Limitation.* An order passed under section 58 read with section 147 of the Indian Companies Act, 1882, is still an order to which the limitation imposed by section 169 of the Act applies. No appeal against such order can, therefore, be heard unless the notice provided for by section 169 has been given.

*Anand Sarup v. Sultan Singh*, I. L. R., 27 All. ... 509

1883—XV (N.-W. P. AND OUDH MUNICIPALITIES ACT) SECTION 40—*Act (Local) No. 1 of 1900, section 47—Act No. IX of 1872 (Indian Contract Act), sections 63, 70 and 72—Municipal Board—Contract—Contract not executed in manner prescribed by law—Part performance—Right of Board to repudiate.* Where a contract with a Municipal Board, which, according to section 40 of Act No. XV of 1883 and section 47 of Local Act No. 1 of 1900 must be executed in a particular form, has not been so executed, no suit can be maintained against the Municipal Board in respect thereof, notwithstanding that there has been part performance

• of the contract and the plaintiff is claiming merely for the value of work done and of materials supplied. *Young & Co. v. The Mayor & Corporation of Royal Leamington Spa*, I. L. R., 8 App. Cas., 517, and *British Insulated Wire Co. v. The Prescott Urban District Council*, I. R., 1895, 2 Q. B. D., 463, followed. *Abaji Sitaray Modak v. The Trimbak Municipality*, I. L. R., 28 Bom., 66, *quoad hoc* dissented from.

• *Radha Krishna Das v. The Municipal Board of Benares*, I. L. R., 27 All. ... 592

ACTS—1887—IX (PROVINCIAL SMALL CAUSE COURTS ACT) SECTION 25—*Revision—Powers of High Court—Civil Procedure Code, section 622.*] *Held* that the powers of revision given to the High Court by section 25 of the Provincial Small Cause Courts Act, 1887, are more extensive than those exercisable by the Court under the provisions of section 622 of the Code of Civil Procedure as at present interpreted. *Sarman v. Khuban*, I. L. R., 16 All., 476, referred to.

*McCarron v. Welti*, I. L. R., 27 All. ... 192

25—*Revision—Small Cause Court suit—Tort—Right of defence of person or property against the attack of a vicious animal.*] A vicious stallion repeatedly attacked on the public road a pair of mares belonging to the carriage in which the defendant was being driven, and finally came into the defendant's compound, in spite of attempts made to prevent him, and continued his attacks, until the defendant getting hold of a spear inflicted a somewhat severe wound on the left hind quarter of the animal. After this the horse made off, but subsequently died from the effects of the spear wound. *Held* that under the circumstances the defendant's action was perfectly justifiable, and the owner of the horse was not entitled to any damages on account of his loss. *Morris v. Nugent*, 7 Car. and P. 572, referred to. *Held* also that the powers conferred by section 25 of Act No. IX of 1887 are wider than those given by section 622 of the Code of Civil Procedure.

*Turner v. Jagmohan Singh*, I. L. R., 27 All. ... 531

SCHEDULE II, ARTICLE 28—*Small Cause Court—Jurisdiction—Suit to recover movable property by right of inheritance.*] *Held* that a suit to recover movable property claimed by right of inheritance and alleged to be wrongfully retained by the defendant is a suit within the jurisdiction of a Court of Small Causes and is not excluded by article 28 of the second schedule to Act No. IX of 1887. *Kepal-lee Bewah v. Keshram Koorh*, 11 W. R. 93, and *Moheshur Mondal v. Koilash Nath Mondal*, 7 C. L. R., 77, followed.

*Chhedi v. Gulabo*, I. L. R., 27 All. ... 622

—1889—VII—(SUCCESSION CERTIFICATE ACT), SECTION 5—*Succession certificate not to be questioned by any Court in subsequent proceedings based thereon.*] Where a certificate of succession has been granted by a Court empowered under Act No. VII of 1889 to grant such certificates, it is not open to a Court before which such succession certificate is produced as authority to collect the debt entered therein to question the right of the Court which granted the certificate.

*Durga Das v. Gullu*, I. L. R., 27 All. ... 67



## ACTS — 1889 — VII (SUCCESSION CERTIFICATE ACT) SECTION 7(3)

—Application for certificate to collect debts—Objection as to status of family of deceased—Inquiry necessary.] Where, on an application for a certificate to collect debts due to a deceased person made by the widow, an objection was filed by a nephew of the deceased that he and the deceased were members of a joint Hindu family and therefore no certificate could be granted to the widow; it was held that the Court was bound to make some inquiry, not necessarily an exhaustive one, into the facts set up by the objector, and was not warranted in passing an order granting a certificate without making any inquiry at all.

Balmakund v. Kundan Kunwar, I. L. R., 27 All. ...

452

## —1895—XV (CROWN GRANTS ACT) SECTION 3, See Act No. I of 1869, section 2

694

—1899—II (INDIAN STAMP ACT), SCHEDULE I, ARTICLE 7.—Construction of document—Promissory note—Acknowledgment.] Three persons borrowed money from a fourth, and at the time a memorandum signed by the borrowers was drawn up in the following terms:—"Account (*lekhi*) of Bhawani Din Kalwar, Katwari Kalwar and Bindhari Kalwar, 8th February 1901, interest 1 per cent. per mensem, payable 3rd May 1901, Rs. 500 borrowed from Udit Upadhyaya for a sugar factory." The document contained no promise to repay the money. Held that this was a mere memorandum which might perhaps amount to an acknowledgment such as would require a *Lanna* stamp, which it bore, but was certainly neither a promissory note nor an acknowledgment coupled with a promise to repay, which would require a stamp of higher value, and would not exclude parol evidence of the contract.

Udit Upadhyaya v. Bhawani Din, I. L. R., 27 All. ...

84

## —(LOCAL)—1900—I (N.W. P. AND ODDH MUNICIPALITIES ACT), SECTION 47, See Act No. XV of 1893, section 40

592

—1901—II (AGRA TENANCY ACT), SECTIONS 79 AND 81—Civil and Revenue Courts—Jurisdiction—Suit by ejected tenant for restoration to possession—Limitation.] An occupancy tenant died leaving two daughters, who had their names recorded as occupancy tenants of their deceased father's holding, but never obtained actual possession thereof. On the contrary, the zamindar put in his own tenant. One of the daughters of the late occupancy tenant, however, gave a lease of half of the holding, and the lessees ultimately sued the zamindar's tenant in a Civil Court to recover possession. Held that the plaintiff's proper remedy was by suit under section 79 of Act No. II of 1901, and as he had been out of possession for something like three years, his suit was barred by limitation. *Dalip Rai v. Deoki Rai*, I. L. R., 21 All., 204 referred to.

Ram Lal v. Chundi Lal, I. L. R., 27 All. ...

372

## SECTION 134.

See Act No. XLV of 1860, section 184 ...

480

## SECTIONS 175,

180 AND 193—Civil Procedure Code, section 2—'Decree'—'Order'—'Appeal'.] Held that no appeal will lie from an appellate order of a Collector, as distinguished from an appellate decree, in proceedings under the Agra Tenancy Act, 1901.

In order to decide what are 'orders' and what 'decrees' under the Agra Tenancy Act, 1901, the definitions contained in the Civil Procedure Code, section 2, must be applied.

Dhani Ram v. Bhola Singh, I. L. R., 27 All. ...

21

<b>ACTS (LOCAL) — 1901—II (AGRA TENANCY ACT), SECTIONS 176, 177 AND 193 — Civil Procedure Code, sections 2 and 244 — 'Order' — 'Decree' — appeal.]</b> Held that an appeal will lie to the District Judge from an order of an Assistant Collector of the first class if such order, by the force of section 2 of the Code of Civil Procedure, amounts to a decree.	
Kharag Singh v. Pola Ram, I. L. R., 27 All. ...	31
SECTION 201,	
See Act No. XII of 1881, section 93 ...	569
SECTION 202	
— <i>Question of tenant right in Civil Court — Question decided by Civil Court — Appeal — Procedure</i> ] Where in contravention of the provisions of section 202 of the Agra Tenancy Act, 1901, a Civil Court heard and determined a suit in which a question of tenant right was raised, and on appeal the lower appellate Court remanded the suit under section 562 of the Code of Civil Procedure, it was held that the lower appellate Court ought not to have remanded the case, but should itself have passed the order required by section 202 of the Tenancy Act, and the High Court made such an order.	
Jagan Nath v. Bhawani, I. L. R., 27 All. ...	167
— III (U. P. LAND REVENUE ACT), SECTIONS 56 AND 86 — <i>Cess — Rent — Payment recorded in wajib-ul-arz as 'mukhtarifa.'</i> Held that certain dues recorded as payable to the zamindars by a class of residents in the <i>abadi</i> other than agricultural tenants, and described in the village <i>wajib-ul-arz</i> as ' <i>mukhtarifa</i> ,' were payments to be made by way of rent, and not cesses such as required the general or special sanction of the Local Government for their validation.	
Muhammad Abdul Hai v. Nathu, I. L. R., 27 All. ...	183
ADOPTION, See Hindu Law ...	417
Evidence of —, See Vendor and purchaser ...	271
ADVERSE POSSESSION, See Act No. XV of 1877, schedule II, article 144 ...	395
See Limitation ...	348
ADVERSE POSSESSION — <i>Suit by co-sharer against lambardar for profits of his share — Limitation — Nature of possession of lambardar.</i> Held that the fact that a co-sharer plaintiff in a suit against the lambardar for his share of profits for three years antecedent to the suit has received no profits for twelve years previous to suit is not by itself sufficient to bar the suit in the absence of evidence that the defendant lambardar was during those twelve years holding adversely to the plaintiff. <i>Raj Bahadur v. Bharat Singh</i> , <i>supra</i> p. 348, followed. <i>Muhammad Husain v. Badri Prasad</i> , Weekly Notes, 1895, p. 88, distinguished. <i>Mahadeo Prasad v. Raja Sawal Singh</i> , I. P. A., No. 8 of 1902, decided on the 13th of June 1902, discussed.	
Mihin Lal v. Badri Prasad, I. L. R., 27 All. ..	436
AGREEMENT opposed to public policy, See Act No. IX of 1872, section 23 ...	73
ALLUVION, See Bengal Regulation No. XI of 1825, section 4 ...	656
APPEAL, See Act No. VII of 1870, section 7, IX; schedule I ...	395
(Court fee), See Act No. VII of 1870, section 11, schedule II, article 71 (vi). ...	559
See Act No. VI of 1882, sections 58, 147 and 169 ...	509



	Page.
APPEAL, <i>See</i> Act (Local) No. II of 1901, sections 175, 180 and 193 ...	21
sections 176, 177 and 198 ...	31
section 202 ...	167
<i>See</i> Civil Procedure Code, sections 2 and 244 ...	380
sections 310A, 588 ...	263
section 586... ...	200
section 629 ...	695
New case set up in— <i>See</i> Act No. I of 1869, section 2 ...	634
ARBITRATION, <i>See</i> Act No. I of 1877, section 21. ...	8
<i>See</i> Civil Procedure Code, sections 508, 514, 516 and 521 ...	459
sections 520, 525 and 526... ...	526
ASSIGNMENT of profits, <i>See</i> Act No. III of 1877, section 17 ...	564
ATTACHMENT, <i>See</i> Act No. XLV of 1860, section 183 ...	258
AWARD, <i>See</i> Civil Procedure Code, sections 508, 514, 516 and 521 ...	459
sections 520, 525 and 526 ...	526
BENAMIDAR, <i>See</i> Civil Procedure Code, section 317 ...	194
section 317 ...	443
BENAMI PURCHASE, <i>See</i> Act No. IX of 1872, section 23 ...	73
BENGAL REGULATIONS—1825—XI, SECTION 4, PARAGRAPHS I AND 2 —Act No. XVIII of 1876 ( <i>Oudh Laws Act</i> )— <i>Accretion—Riparian proprietors—Change in course of river—Gradual and imperceptible accretion—Alteration of land by sudden change of course of river or by violence of its stream—Ownership not changed—Tidal and non-tidal rivers.</i> The appellant sued to recover possession of a large extent of land which she claimed as an accretion to her estate of Kamyar lying on the south side of the river Gogra, a non-tidal river, by reason of a change in the channel of the river the effect of which was as stated in the plaint that “the northern channel receding gradually to the north the said land was added to Kamyar as alluvial accretion towards the south of the said channel.” It was found by the Judicial Committee that the predecessors of the respondent were the original owners of the land claimed; that there had been no slow and gradual pushing northward of the northern boundary of the appellant's land; and that there was still a channel of the river between the properties of the appellant and respondent, although the main stream had shifted to the north. Held that it was not a case of accretion by gradual slow and imperceptible means, in which, as laid down in <i>Lopez v. Muddun Mohan Thakur</i> , 13 Moore's L. A., 467; 5 B. L. R., 521, the accreted land belongs to the owner of the adjoining land; but the principle applicable to it was that laid down in paragraph 2 of section 4 of Regulation XI of 1825 (which was applied to Oudh by Act XVIII of 1876), that in cases in which a river by a sudden change in its course or by the violence of its stream separates land from one estate and joins it to another without destroying its identity and preventing the recognition of the land so removed, in such cases the land on being clearly recognized remains the property of the original owners—in this case the respondents. <i>Mayor of Carlisle v. Graham L. R.</i> , 4 Exch. 361, followed.	
The principle of that case, which had reference to a tidal river is equally applicable to a non-tidal river.	
Ritraj Kunwar v. Sarfaraz Kunwar, I. L. R., 27 All. ...	665
BCNÂ FIDE PURCHASER, <i>See</i> Execution of decree ...	62

# GENERAL INDEX.

xxix

Page.

BURDEN OF PROOF, <i>See</i> Act No. I of 1872, section 102	...	71
<i>See</i> Act No. XV of 1877, section 18; schedule II, articles 10 and 120	...	540
CAUSE OF ACTION— <i>Suit for "maintenance" of possession—Pleadings—Suit virtually to procure rectification of an erroneous decree.</i> Plaintiff in a suit for possession as usufructuary mortgagee of 13 bighas had to redeem five prior usufructuary mortgages comprising part of the 13 bighas mortgaged to him and some 15 bighas in addition; but the decree which he obtained was drawn up erroneously and gave the plaintiff a right to the possession of 13 bighas only, and not of the whole 28 bighas. Plaintiff never appealed against this decree, nor did he apply in review to have the error in the decree corrected, but he subsequently brought a suit in which he asked, first, for "maintenance" of possession in respect of the 15 bighas, and, secondly, for recovery of possession, if he should be found not to be in possession. He alleged in his plaint that he was in possession and that one of the defendants at the instigation of another was interfering with his rights. It was found that plaintiff had never obtained possession of the 15 bighas. <i>Held</i> that the suit did not lie. If the suit was for maintenance of possession no cause of action appeared, and in any other view the suit was one virtually to set right an erroneous decree, which could not be done by means of such a suit.	...	174
<i>Basawan Kurmi v. Nakchhedi Pande</i> , I. L. R., 27 All.	...	12
<i>See</i> Pre-emption	...	87
CERTIFICATE OF SUCCESSION, <i>See</i> Act No. VII of 1889, section 5	...	452
TO COLLECT DEBTS, <i>See</i> Act No. VII of 1889, section 7(3)	...	183
CESS, <i>See</i> Act (Local) No. III of 1901, sections 56 and 86	...	271
CHAMPERTY AND MAINTENANCE <i>See</i> Vendor and purchaser	...	69
CHARGE. Form of—, <i>See</i> Criminal Procedure Code, section 234	...	561
CHEATING, <i>See</i> Act No. XLV of 1860, section 415	...	302
sections 417, 420	...	372
CIVIL AND REVENUE COURTS, <i>See</i> Act (Local) No. II of 1901, sections 79 and 81	...	163
<i>See</i> Civil Procedure Code, section 16	...	21
CIVIL PROCEDURE CODE, SECTION 2, <i>See</i> Act (Local) No. II of 1901, sections 175, 180 and 193	...	21
SECTIONS 2, 244—"Decree"— <i>Appeal—Contempt of Court—Order directing refund of moneys realized in defiance of Court's order—Revision.</i> Where a Court orders the refund of moneys improperly realized in defiance of subsisting orders of attachment, it can only order the refund of moneys actually collected, it is not competent to direct a refund of moneys recovered as costs of litigation.	...	
<i>Held</i> also that an order passed in the exercise of the inherent powers of a Court to punish for contempt is not a decree, and no appeal lies therefrom.	...	
In this case the Court dealt with what purported to be a memorandum of appeal as an application in revision under section 622 of the Code of Civil Procedure.	...	
<i>Godu Ram v. Suraj Mal</i> , I. L. R., 27 All.	...	380
SECTIONS 2 AND 244, <i>See</i> Act (Local) No. II of 1901, sections 176, 177 and 193	...	31

CIVIL PROCEDURE CODE, SECTION 13. *Res judicata*—*Question directly and substantially in issue*—*Omission to raise ground of defence in former suit.* *H*, an Oudh taluqdar, executed a deed of gift in 1869 by which he purported to give to *R* (the only son of his elder son who was dead) the whole taluq with the exception of a few villages. In 1871 a suit brought by *H* against *R* to have it declared that notwithstanding the deed of gift the proprietary right in the taluq was vested in him was settled by a compromise by the terms of which various portions of the taluq were to be held for life by *H*, *R* and *D* the mother of *R*, and on the expiration of those three lives, *L* (the younger son of *H*) and his heirs were to succeed to the whole of the estate. This compromise was embodied in a decree of Court. In 1876 *H* and *L* brought a suit against *R* and his wife to cancel a deed conveying a portion of the taluq to the latter as being in excess of the powers of alienation given to *R* by the compromise of 1871. The defendants in that suit did not contest the validity of the compromise, but upheld the alienation as valid, and asserted that *L* had no such interest in the property as entitled him to sue, and issues were raised on those points. The Court held that *L* was "a certain remainder man under the terms of the agreement," that he "or his representatives will certainly inherit the estate some time or other," and that he was entitled to sue; that the alienation was void as against *H* as being in excess of the power reserved by the compromise to *R*, who was held only entitled to alienate for his life; but that no right had yet accrued to *H* and *L* to disturb the possession of *R*'s wife. In 1880 after the deaths of *H*, *D* and *L*, a portion of the taluq was attached by creditors of *R* and sold in execution of decree without limit of title. In a suit brought by the son of *L* in 1896 against *R*, his judgment creditors, and the purchaser at the sale to have it declared that the plaintiff was entitled as the immediate reversioner to an absolute estate in the portion sold on the death of *R*, and that after *R*'s death the sale would be inoperative as against him, the defendant *R* set up the defence that he had by virtue of the deed of gift of 1869 an absolute title which was not displaced by the effect of the compromise and the decree embodying it.

Held by the Judicial Committee (confirming the decision of the Judicial Commissioners of Oudh) that the decision in the suit of 1876, as having established between *R* and *L* (the father and predecessor in title of the plaintiff) that *R* had only a life interest in the taluq, and that *L* (and therefore also the plaintiff as his heir) had a vested interest in remainder, was *res judicata* in the present suit.

Rampal Singh v. Ram Prasad Singh, I. L. R., 27 All. ...

37

SECTION, 13—*Res judicata*—*Pro forma defendant.* The plaintiff sued Nathu Mal and Mathri to recover possession of certain mortgaged property alleging that the mortgage had been discharged by payment of half the amount due to the persons whom he made defendants and half to Malhi Kunwar and others as representatives of one Mitter Sen. The defendants, 1st party, pleaded that they were entitled to the whole of the mortgage money, and that payment of one-half to the representatives of Mitter Sen was no payment as against them. Malhi Kunwar and others were made defendants to the suit, and in the end it was held that the defendants, 1st party, were entitled to the whole of the mortgage money, and a decree was passed in favour of the plaintiff on payment of Rs. 997 to Nathu Mal and Mathri. The Court in that suit exempted the defendants Malhi Kunwar and others, holding that they had no interest in property in suit. Subse-

quently the plaintiff sued Malhi Kunwar and others to recover from them the money paid on account of the mortgage. *Held* that the decision in the former suit did not render the question of payment to the present defendants *res judicata*. *Brojo Behari Mitter v. Kedar Nath Mozumdar* (I. L. R., 12 Calc., 580), approved.

*Malhi Kunwar v. Imam-ul-din*, I. L. R., 27 All. ... 59

**CIVIL PROCEDURE CODE, SECTION 13, explanation II—*Res judicata***—*Matter which might and ought to have been made a ground of attack in a former suit.*] The plaintiffs sued for their share by right of inheritance in the assets of a deceased Muhammadan, the defendant being the widow of the propositus. In that suit the widow pleaded that she was in possession of the property claimed in virtue of a deed of gift from her late husband, and also that she had a lien on it for unpaid dower. The latter defence was accepted by the Court, and the plaintiffs' suit dismissed. The plaintiffs then brought a second suit against the widow, in which they offered to redeem the dower-debt, and claimed possession after such redemption. *Held* that this second suit was not barred by section 13, explanation II, of the Code of Civil Procedure.

*Zinat-un-nissa v. Rajan*, I. L. R., 27 All. ... 142

**SECTION 13—*Res judicata*—Execution of decree**—*Application dismissed for want of jurisdiction—No appeal from order of dismissal—Subsequent application barred.*] A Munsif as a Court executing a decree dismissed an application for execution, holding that owing to certain proceedings in insolvency which had taken place at the instance of the judgment-debtor in the Court of the District Judge, he (the Munsif) had no jurisdiction to entertain it. No appeal was preferred against the order of the Munsif dismissing this application for execution, and the Munsif's order became final.

*Held* that a further application by the same decree-holder in the same Court to execute the same decree against the same judgment-debtor was barred by section 13 of the Code of Civil Procedure.

*Nabi Muhammad v. Jwala Prasad*, I. L. R., 27 All. ... 148

**SECTION 13—*Res judicata*—Estoppel—Suit in Civil Court for ejectment of defendant as a trespasser—Effect of previous litigation in Revenue Courts.**] Plaintiffs applied to a Rent Court to eject defendant, alleging that he was their tenant, but their application was ultimately rejected on the finding that defendant was either the owner or a rent-free tenant of many years' standing. Again plaintiffs applied for enhancement of rent in respect of the same land from which they had previously sought to eject plaintiff, but were again defeated on the finding that the defendant was in adverse possession. Subsequently plaintiffs sued in the Civil Court to eject defendant as a trespasser. *Held* that the plaintiffs were not debarred from having recourse to the Civil Court. *Baldeo Singh v. Imdad Ali*, I. L. R., 15 All., 189, distinguished.

*Maheesh Prasad v. Ranjor Singh*, I. L. R., 27 All. ... 163

**SECTION 32, See Act No. IV of 1882, section 85** ... 75

**SECTIONS 82, 174, See Act No. XLV of 1860, sections 225B and 353** ... 491

**SECTION 54, See Act No. VII of 1870, section 28** ... 412



**CIVIL PROCEDURE CODE, SECTIONS 111 and 216 — Set-off — Cross claim in the nature of set-off.]** Plaintiffs as brokers for the sale of indigo seed sued defendants to recover the amount alleged to be due to them by the defendants as commission on account of certain sales of indigo seed made by them on behalf of the defendants. Held that the Court might properly take into consideration by way of an equitable set-off the loss occasioned by the plaintiffs to the defendants through the plaintiffs' negligence in not carrying out the defendants' instructions respecting the selling of the seed. *Niaz Gul Khan v. Durga Prasad*, I. L. R., 15 All. 9, followed.

*Nand Ram v. Ram Prasad*, I. L. R., 27 All. ... 145

**SECTION 206 — Execution of decree — Limitation — Amendment of decree — Act No. XI of 1877 (Indian Limitation Act), sections 19, 20 and 21; Schedule II, article 179 — Part payment by one of several judgment-debtors.]** An order granting an application under section 206 of the Code of Civil Procedure is not an order passed upon review of judgment within the meaning of article 179 of the second schedule to the Indian Limitation Act, 1877, and has not the effect of extending the period of limitation for execution of the decree. *Daya Kishan v. Nanhi Begam*, I. L. R., 30 All. 804, *Torai Ram v. Man Singh*, I. L. R., 8 All. 492, and *Kalla Rai v. Fakiman*, I. L. R., 13 All. 124 followed. *Kishan Sahai v. The Collector of Allahabad*, I. L. R., 4 All. 137, referred to. *Kali Prasad v. Ram Roy v. Lal Mohan Guba Roy*, I. L. R., 25 Cal. 258, dissented from.

A payment made by one of several persons jointly liable under a decree, otherwise than as agent of his co-judgment-debtors, cannot operate to save limitation as against any of the judgment-debtors other than the person making the payment.

*Ahsan-ul-lah v. Dakkhini Din*, I. L. R., 27 All. ... 575

**SECTION 215A — Principal and agent — Suit for an account — Form of decrees.]** In a suit by a principal against an agent for an account, on the fact of agency being established, it is the duty of the Court to direct an account to be taken of the defendant's dealings as agent. When once the plaintiff has shown that the defendant is an accounting party, it is then for the defendant to prove the amount of his receipts and disbursements. *Hurronath Roy Bahadur v. Krishna Coomar Bukshi*, I. L. R. 13 I. A., 123, and *Ram Das v. Bhagwat Das*, Weekly Notes, 1905, p. 1, referred to.

*Raghunath v. Ganpatji*, I. L. R., 27 All. ... 374

**SECTION 233, See Act No. IV of 1882,**  
section 99 ... 450

**SECTION 235, See Act No. IV of 1882,**  
sections 88 and 89 ... 625

**SECTION 244 — Alteration of decree after execution — Application for refund of money realized in execution — Limitation — Act No. XI of 1877 (Indian Limitation Act), Schedule II, Article 178.]** A decree for sale under section 84 of the Transfer of Property Act, 1882, as drawn up, allowed a very high rate of interest to the decree-holder, and the amount due under this decree as it stood was realized by sale of the mortgaged property. Subsequently, on the judgment-debtor's application, the decree was amended, so as greatly to reduce the rate of interest, and thereby a refund became due to the judgment-debtors.

*Held* that the judgment-debtors' application for a refund was not an application in execution but an application under section 244 of the Code of Civil Procedure, and that the limitation applicable was that prescribed by article 178 of the second schedule to the Indian Limitation Act, 1867, and began to run from the date of the amendment of the decree.

Harnam Chandar v. Muhammad Yar Khan, I. L. R., 27 All. 485

SECTION 244—*Execution of decree—Sale in execution set aside and purchase money returned—Sale confirmed on appeal—Suit by decree-holder to recover purchase money.*] A sale held in execution of a decree for money was set aside on application by the judgment-debtor under section 311 of the Code of Civil Procedure and the purchase money was returned. On appeal, however, the order setting aside the sale was reversed and the sale confirmed in favour of the original purchaser. The purchaser however did not pay the sale price, and the decree-holder accordingly sued him for its recovery. *Held* that the suit did not lie, but the matter was one governed by section 244 of the Code of Civil Procedure. *Gulzari Mal v. Madho Ram*, I. L. R., 26 All., 447, followed.

Rahim-ud-din v. Ram Lal, I. L. R., 27 All. 155

SECTION 244—*Execution of decree—Questions in execution—Mortgage by conditional sale—Decree for foreclosure—Payment by puisne mortgagee defendant in prior mortgagee's suit for foreclosure—Application by such puisne mortgagee for decree absolute for foreclosure—Act No. 11 of 1882 (Transfer of Property Act), sections 74 and 86—Form of decree.*] In a suit brought by the respondent as prior mortgagee for foreclosure of a mortgage by conditional sale, in which the appellant, a second mortgagee of the same property, was a defendant, a decree was passed for foreclosure and allowing six months for redemption, and a similar decree was made in a suit brought by the respondent and the appellant as second mortgagees. Eventually, as the mortgagors (the other defendants) made no payment to secure redemption, and in order to prevent a decree absolute for foreclosure against himself, the appellant paid into Court the sum due under the decree in the first suit, and it was drawn out by the prior mortgagee. The appellant then made an application to the Court in that suit that, as he had by his payment become, under section 74 of the Transfer of Property Act, the representative of the prior mortgagee, a decree absolute for foreclosure might be passed in his favour. The Court held that he was entitled to bring a suit for foreclosure, but that "he had not acquired the status of a decree-holder" and that "while he was a defendant he could not execute the decree as a decree-holder," and the application was dismissed. *Held* by the Judicial Committee (reversing the decision of the High Court) that a subsequent suit brought by the appellant for foreclosure was not barred by section 244 of the Civil Procedure Code, the questions between the parties not being such as could have been determined by the Court in execution of the decree in the former suits.

That decree (which appeared to be a transcript of the form of order given in section 86 of the Transfer of Property Act) did not provide for the exercise by the puisne incumbrancer of their successive rights of redemption, or for working out the rights of the parties in the event of puisne incumbrancer, in front of the mortgagor, redeeming the mortgaged property.



An appropriate decree for that purpose in use in the English Courts given in Seton on Decrees, 6th Edition, Vol. III, page 1979, referred to.

Gopi Narain Khauna v. Bansidhar, I. L. R., 27 All. ... 325

**CIVIL PROCEDURE CODE, SECTION 244—Execution of decrees—Sale in execution—Application to set aside sale on the ground of fraud.]** An application to set aside on the ground of fraud a sale held in execution of a decree can be made under section 244 of the Code of Civil Procedure even after the sale has been confirmed. *Moti Lal Chakrabutty v. Russick Chandra Bairagi*, I. L. R., 26 Calc., 326, foot note, and *Durga Charan Mandal v. Kali Prasanna Sarkar*, I. L. R., 26 Calc., 727, followed. *Irosanno Kumar Sangal v. Kali Das Sangal*, I. L. R., 19 Calc., 683, referred to.

Wahid-un-nissa v. Girdhari, I. L. R., 27 All. ... 702

**SECTION 244—Mortgage—Satisfaction by mortgagor of decree for sale on a prior mortgage with money borrowed on the security of a subsequent mortgage of the same property—Rights of subsequent mortgagees.]** A decree for sale and an order absolute for sale had been passed against a mortgagor. The mortgagor then borrowed more money on a mortgage of several villages, including those previously mortgaged, and applied a portion of such money in satisfying the previous decree for sale. The subsequent mortgagees then brought a suit upon her mortgage, in which she sought to bring to sale the villages which were the subject of the previous mortgage and decree. *Held* that she could do so. Section 244 of the Code of Civil Procedure did not apply, and there was no reason why the plaintiff should be driven to recover part of her loan by executing the previous decree and the remainder by suit on her mortgage. *Bansi Dhar v. Gaya Prasad*, I. L. R., 24 All., 179, distinguished.

Tufail Fatma v. Bitola, I. L. R., 27 All. ... 400

**SECTION 278—Execution of decrees—Decree for sale on a mortgage—Prior mortgagee not entitled to intervene in execution proceedings.]** In a suit for sale on a mortgage the plaintiff obtained a decree and an order absolute for sale of the mortgaged property. A person who had not been a party to the suit intervened, alleging himself to be a prior mortgagee, and objected to the sale, and the sale was stopped. *Held* that the prior mortgagee, if he were one, was not entitled to intervene in these execution proceedings and that the order allowing his objection was passed without jurisdiction and was a proper subject for revision.

Hukam Singh v. Raghubir Saran, I. L. R., 27 All. ... 700

**SECTIONS 278, 283—Act No. XV of 1877, schedule II, article 12—Suit to establish right to property sold in execution—Limitation—Sale without decision as to rights of intervenor.]** When an intervenor claims a share of attached property the Court should define the respective shares of the debtor and the intervenor, and sell the debtor's definite share only. If the Court omits to do so, and sells the attached property subject to the intervenor's claim, this is no valid order under sections 280, 281 or to 282 of the Code of Civil Procedure, and the limitation of one year for a suit under section 283 of the Code does not apply. *Manohar Khan v. Troyluckhonath Ghose*, 4 W. R., 35, followed.

Udit Narain Singh v. Murtaza Khan, I. L. R., 27 All. ... 464

CIVIL PROCEDURE CODE, SECTION 283—*Execution of decree—Suit for declaration that property is liable to attachment and sale—Valuation of suit.*] A decree-holder holding a decree from a Court of Small Causes, which has been transferred to a Munsif for execution, attached certain property as that of the judgment-debtor. The judgment-debtor's wife objected under section 278 of the Code of Civil Procedure that the property was hers. This objection prevailed, and the property was released from attachment. The decree-holder then filed a regular suit against the objector and the judgment-debtor to have it declared that the property was liable to attachment and sale in execution of her decree. *Held* that the proper valuation of such suit for the purposes of jurisdiction was the amount of the decree under execution and not the value of the property attached. *Dwarkan Das v. Kameshar Prasad*, I. L. R., 17 All., 69, explained.

Dhan Devi v. Zamurrad Begam, I. L. R., 27 All. ...

440

SECTION 285—*Execution of decree—Sale by Court of lower grade of property attached by a Court of higher grade—Sale invalid.*] Where the same property is under attachment by two Courts of different grades, a sale effected by the Court of lower grade is a nullity, whether such sale was effected in ignorance of the attachment imposed by the Court of higher grade or not, and consequently a purchaser at such sale has no *locus standi* to sue for a declaration that a subsequent sale held in pursuance of the attachment imposed by the Court of higher grade is not valid. *Chiranjil Lal v. Jawahir Mal*, Weekly Notes, 1904, p. 95, followed.

Har Prasad v. Jagan Lal, I. L. R., 27 All. ...

56

SECTION 287—*Execution of decree—Question of saleability of property in execution—Property described in decree as a permanent tenancy—Estoppel—Duty of Court executing decree.*] In execution of a decree on a compromise for payment of a certain sum of money and in default thereof for the sale of certain properties therein specified, application was made to sell certain fields described in the decree as held by the judgment-debtor on a permanent tenure. The judgment-debtor objected that the properties were not saleable, being held by occupancy tenure. *Held* that this objection was not open to the judgment-debtor, inasmuch as it was one which he might have raised in the suit in which the decree was passed, but did not. But the statement as to tenure contained in the decree was not binding on third persons.

*Per Buxitt, J.*—It would be the duty of the Court executing the decree, should it have reason to believe that the property the sale of which was asked for was held by occupancy tenure, to notify that fact in the proclamation of sale as a warning to prospective bidders.

*Ram Janam Ram v. Rameshar Rai*, Weekly Notes, 1892, p. 5, followed.

Basdeo Prasad v. Juthan Ram, I. L. R., 27 All. ...

684

SECTION 295—*Execution of decree—Application for rateable distribution of assets—Notice of such application to other decree-holders unnecessary.*] *Held* that it is nowhere provided by law either that an application for rateable distribution of assets realized in execution of a decree cannot be made in the course of execution proceedings taken by the applicant himself, but must be made in the course of execution proceedings

initiated by some other decree-holder, or that notice of such an application having been made must of necessity be given to the other decree-holders.

Chunni Lal v. Jugal Kishore, I. L. R., 27 All. ... 132

CIVIL PROCEDURE CODE, SECTION 295—*Execution of decree—Suit for refund of assets wrongly distributed.*] D held a simple money decree against S. P held a decree under section 90 of the Transfer of Property Act against S, personally and as representative of R, the original decree for sale having been passed against S and R jointly. D realized in execution of his decree a sum of Rs. 1,100 by sale of property belonging to S alone. Held that P was entitled to a rateable distribution of the assets so realized under the provisions of section 295 of the Code of Civil Procedure. *Gonash Das Bagria v. Shiva Lakshman Bhakat*, I. L. R., 30 Cal., 583, followed.

Gatti Lal v. Bir Bahadur Sahai, I. L. R., 27 All. ... 158

SECTIONS 310A, 588—*Appeal—No appeal from an order setting aside a sale under section 310A.*] Held, that no appeal lies from an order under section 310A of the Code of Civil Procedure setting aside a sale, whether the auction purchaser is the decree-holder or an outsider. *Mendai Lal v. Bhujja Singh*, Weekly Notes, 1895, p. 140 referred to.

Kuber Singh v. Shib Lal, I. L. R., 27 All. ... 268

SECTIONS 313 AND 315—*Execution of decree—Sale in execution of property to part of which only the judgment-debtor had a title—Rights of purchaser—Contribution.*] In execution of a decree for sale on a mortgage part of the mortgaged property was sold by auction, but after the sale it was found that the judgment-debtor had no title to about two-thirds of the property sold. The auction purchaser then sued the representatives of the mortgagee for contribution as against the remainder of the mortgaged property. Held that the suit would not lie. An auction purchaser has in the absence of fraud no remedy unless the judgment-debtor has no saleable interest at all in the property sold as his, and then only under sections 313 and 315 of the Code of Civil Procedure; but these sections do not apply when the title of the judgment-debtor to part only of the property sold is defective. *Santo Chandar Mukerji v. Nain Sukh*, I. L. R., 23 All., 355, followed.

Muhammad Rahmat-ullah v. Bachho, I. L. R., 27 All. ... 537

SECTION 317—*Execution of decree—Suit based on the ground that the certified purchaser is not the real purchaser—Benamidar.*] One Habib Alam in execution of a decree for money against Masud Alam attached and brought to sale the one-third share of Masud Alam in certain house property, and it was purchased by Aziz Alam, the son of the judgment-debtor. Subsequently the same property was again attached and sold at the instance of Habib Alam, and this time was purchased by Khuda Bakhsh. Khuda Bakhsh was obstructed in obtaining possession of the property, and thereupon brought a suit for possession to which he made Masud Alam and others, alleged to be co-parceners in the property, parties defendants, but not the auction purchaser Aziz Alam. Aziz Alam was, however, added as a defendant under section 32 of the Code of Civil Procedure. Held that to these facts section 317 of the Code was applicable and the suit must be dismissed.

Khuda Bakhsh v. Aziz Alam, I. L. R., 27 All. ... 194

CIVIL PROCEDURE CODE, SECTION 317—*Execution of decree—Sale in execution—Suit by certified against real purchaser—Plea that the purchase was benami for the defendant.*] Held that section 317 of the Code of Civil Procedure does not debar a person in possession of property purchased at auction sale held in execution of a decree, when sued for the rents and profits of such property by the certified purchaser, from setting up as a defence to the suit that the certified purchaser was only a benamidar on his behalf. *Bishan Dial v. Ghazi-ud-din*, I. L. R., 23 All., 175, discussed.

*Ghazi-ud-din v. Bishan Dial*, I. L. R., 27 All. ... 443

SECTION 331—*Execution of decree—Resistance or obstruction by person other than the judgment-debtor—Investigation of claim—Nature of investigation.*] A Court investigating, under the provisions of section 331 of the Code of Civil Procedure, a claim to property sought to be taken in execution of a decree is not confined to the mere question of possession but is bound to decide on the title to the property in dispute. *Moulakhan v. Gorikhan*, I. L. R., 14 Bom., 627, *Bapujirao v. Fatesing Shahaji Bhosle*, I. L. R., 22 Bom., 967, and *Kucha Rai v. Purmeshur Dyal*, N.-W. P. H. C. Rep., 1870, 252, followed.

*Mahip Rai v. Dwarka Rai*, I. L. R., 27 All. ... 458

SECTIONS 351 AND 352, See Pre-emption 670

SECTIONS 508, 514, 516, AND 621—*Arbitration—Award—Validity of award made, but not reaching the Court within the time limited.*] In the case of an arbitration made under the order of a Court it is sufficient if the award be made, that is, completed and signed by the arbitrators, within the period limited under section 508 of the Code of Civil Procedure; it is not necessary to the validity of such award that it should actually reach the hands of the Court within such period. *Arunugam Chetti v. Arunachalam Chetti*, I. L. R., 22 Mad., 22 and *Umersey Premji v. Shamji Kanji* I. L. R., 13 Bom., 119 followed. *Raja Har Narain Singh v. Chaudhrain Bhagwant Kuar*, I. L. R., 13 All., 300 referred to. *Behari Das v. Kailan Das* I. L. R., 8 All., 543 dissented from.

*Asad-ul-lah v. Muhammad Nur*, I. L. R., 27 All. ... 459

SECTIONS 520, 525 AND 526—*Arbitration—Application to file a private award—Award in excess of powers of arbitrator—Court not competent to remit award.*] A Court to which an application is made under section 525 of the Code of Civil Procedure to file an award made without the intervention of a Court has no power to amend the award or to remit it for reconsideration, but only possesses the power to file and enforce it or to reject the application. *Alarakhia Shirji v. Jehangir Hormasji*, 10 Bom., H. C. Rep., 391; *Juala Singh v. Narain Das*, I. L. R., 3 All., 541; *Mana Vikrama v. Mallicheery Kristnan Nambudri*, I. L. R., 3 Mad., 68, and *Dandekar v. Dandekars*, I. L. R., 6 Bom., 663, referred to.

*Mustafa Khan v. Phulja Bibi*, I. L. R., 27 All. ... 526

SECTION 523, See Act No. I of 1877, section 21 ... 53

SECTION 562—*Remand—Preliminary point—Suit decided with reference to some only of several issues framed.*] Held that it is competent to an appellate Court to remand a case under section 562 of the Code of Civil Procedure where the Court of first instance, having framed issues and recorded all the evidence, has decided the suit with reference to its finding upon one or more of the issues framed by it leaving other issues undecided.



*Sheoambar Singh v. Lallu Singh*, I. L. R., 9 All., 80, foot-note, and  
*Ramachandra Joishi v. Kazi Hasim*, I. L. R., 16 Mad., 307, followed.

*Mata Din v. Jamna Das*, I. L. R., 27 All. ... 691

**CIVIL PROCEDURE CODE, SECTION 584—Specific relief—Mandatory injunction—Discretion of Court—Injunction refused upon unsubstantial grounds.** In a suit by co-sharers for demolition of a building as having been recently erected without their consent on common land by another co-sharer the Court found that the building had been erected as alleged by the plaintiffs, but refused to grant them a mandatory injunction upon the ground that "the area was reclaimed by the appellant, defendant, and that others (the plaintiffs included) who have done the same have been allowed to build on the areas thus reclaimed without any objection, and that no special damage was done." *Held* that this was not a valid reason for refusing to grant a mandatory injunction; and that such refusal was under the circumstances a good ground of appeal within the meaning of section 584 of the Code of Civil Procedure.

*Ram Bahadur Pal v. Ram Shankar Prasad Pal*, I. L. R., 27 All. 688

**SECTION 586—Suit of the nature cognizable by a Court of Small Causes—Appeal.** The plaintiff sued as widow of a deceased Brahman priest to recover from the defendant certain books containing lists of the clients of her late husband and also a sum of Rs. 60, on the allegation that the defendant had been entrusted with the books and had realized the money as her agent for the purpose of carrying on the business of her deceased husband, and, contrary to the terms of the agency, had not handed over the money which he had obtained from the clients to her. *Held* that this was a suit of the nature cognizable by a Court of Small Causes within the meaning of section 586 of the Code of Civil Procedure.

*Hans Raj v. Ratni*, I. L. R., 27 All. ... 300

**SECTION 622, See Act No. IX of 1887, section 25** ... 192

**SECTION 629—Review of judgment—Appeal from order granting a review—Grounds of appeal.** When an application for review of judgment has been granted for "any other sufficient reason," the sufficiency or otherwise of the reason for granting it is not a ground of appeal within the meaning of section 629 of the Code of Civil Procedure.

*Per* RICHARD, J.—But the fact that the Court fee on the plaint, at first held to be inadequate, is afterwards found to be sufficient is a good ground for granting a review of judgment.

*Ali Akbar v. Khurshed Ali*, I. L. R., 27 All. ... 695

**COMPANY, See Act No. VI of 1882, sections 58, 147 and 169** ... 509

**CONSTRUCTION OF DOCUMENT—Deed of trust executed by King of Oudh providing pensions to members of family and support to religious endowment out of interest on Government Loan subscription—"Heirs"—"Descendants"—Suit for pension on death of pensioner—Succession to pension.** By a deed of trust dated 23rd November 1839, the King of Oudh appropriated the interest of a sum of 12 lakhs of rupees lent to the East India Company to the payment in perpetuity of pensions to certain persons named in the deed and to making provision for the support of a religious endowment. By Article I (which stated that "the interest has been bestowed as a gift on the person named herein") trustees were named and appointed, and after them "their descendants," to manage the



endowment and a person was named, and his "descendants" after him, as the vakil of the pensioners through whom the pensions were to be paid. Article 2 commended the pensioners and their "descendants" to the kindness and support of the Government. Article 3 provided for the gift over of the pensions in the case of any of the pensioners, or after them any of their "heirs" dying without "heir." Article 4 referred to the trustees of the endowment and their "descendants" and in case no "descendant" remained, provided for the appointment of one of the pensioners "in place of the person dying without heir." *Held* by the Judicial Committee (reversing the decision of the Court of the Judicial Commissioners of Oudh) that on the true construction of the deed the succession to a pension on the death of one of the pensioners was not limited to an heir who was also a descendant, but the heir by Muhammadan law of the deceased pensioner (in this case the sister) was entitled to succeed.

*Nawab Sultan Mariam Begam v. Nawab Sahib Mirza*, L. R., 16 I. A., 176; I. L. R., 17 Calc., 234, distinguished.

This construction did not introduce any inconsistency between Article 2 and Articles 1 and 3 of the deed, because the class of persons mentioned in Article 2 could not be assumed to be precisely co-extensive with the class who could, under the latter articles, enjoy the pensions.

Even if the words "heir" and "descendant" were used as convertible terms in portions of the deed relating to the devolution of the rights of the managers of the endowment and of the vakil of the pensioners, that would not affect the right of succession to the pensions, the descent of the trusteeships and the descent of the beneficial interest in the pensions being distinct things, and there being nothing to show they were intended to be governed by the same rules.

*Nurjahan Begam v. Faghfur Mirza*, I. L. R., 27 All. ... 383

**CONSTRUCTION OF DOCUMENT—Grant of zamindari by Government to member of a joint Hindu family and another—Joint tenants—Tenants in common.** In 1886 Government granted, as a reward for services rendered during the Mutiny, certain zamindari property to Jiwan Ram, Chattarpat, and Nem Ram, members of a joint Hindu family, and to one Puse, a stranger to the family. Puse shortly afterwards got his share separated. Nem Ram died leaving a widow, Musammat Phulla, and after his death Jiwan Ram, Chattarpat, and Phulla joined in selling a portion of the property, the subject of the grant of 1886, to one Nur Ahmad. *Held*, on suit by certain members of the joint Hindu family, who were not parties to the sale, to recover from the representatives of the vendees the share in the property sold which had been of Nem Ram in his life-time, that the grant of 1886 conveyed the property to the grantees as joint tenants and not as tenants in common, and therefore the transfer impugned was valid.

*Gobind Prasad v. Inayat Khan*, I. L. R., 27 All. ... 310

*See Specific performance* ... 696

**Lease—Admissibility of evidence**  
—Dismissal of suit on account of inadmissibility of document relied on by plaintiff. The plaintiff sued to eject the defendants from a certain shop, basing his case upon a document put forward as a "kiraya-namah" or lease. This document was ruled inadmissible for want of registration and plaintiff's suit thereupon dismissed. *Held* that even if the document were inadmissible in evidence, its rejection did not involve the dismissal of the plaintiff's suit.

The document in question was in the following terms:—"I take the shop on a rent of Rs. 50 per annum without any limit of time for ever . . . I shall pay the rent month by month rateably to Mahant Puran Das . . . On non-payment of rent a right to eject the tenants shall at once accrue to the owner of the shop." *Held* that this was not a lease, nor even a counterpart of a lease, but a mere statement of the intention of the writer, which might be given in evidence for what it was worth.

Reni v. Puran Das, I. L. R., 27 All. . . . .

190

**CONSTRUCTION OF DOCUMENT—Mortgage—Interest—Possession**  
—*Liability of mortgagee in possession to account for rents and profits.*] The defendants were in possession of two shops under a mortgage from the plaintiffs. The plaintiffs sought to recover possession alleging that the mortgage debt had been satisfied by the rents and profits of the shops. The defendants pleaded, *inter alia*, that they were not liable under the terms of the mortgage to render an account of the rent realized.

The material portion of the mortgage was in the following terms:—

"We have borrowed nine hundred and fifty-one (951) rupees in cash of the Nana Shahi coin on account thereof and paid the same to Punno and Chunu of Sagar. Interest shall be paid on this money at Rs. 1 per cent. Rupees 9.3.6 shall be paid for every month as the sum remaining after deduction, the promised time being five years. Should we pay the money within five years, we shall get the shops. We shall pay the expenses relating to the two shops. Should they be paid by the mortgagees, we shall pay them the same together with interest without any objection.

*Held*, on a construction of the mortgage, by STANLEY, C.J., and BLAIR J., Aikman, J. *dissentiente*, that, there being no contract to the contrary, the mortgagees, if they got possession, which they did, were bound to account for the rents and profits received by them whilst in such possession. There was no agreement that the mortgagees should take the rents and profits without accounting in addition to the stipulated interest.

Madari v. Baldeo Prasad, I. L. R., 27 All. . . . .

351

	See Act No. I of 1872, section 92	612
I, article 1	See Act No. II of 1899, schedule	
	See Hindu Law	84
	See Pre-emption	364
	See Pre-emption	457
	See Pre-emption	602
CONTEMPT OF COURT, See Civil Procedure Code, sections 2 and 244		380
CONTRACT, See Act No. IX of 1872, section 24		266
	See Act No. XV of 1883, section 40	592
CONTRIBUTION, See Civil Procedure Code, sections 313 and 315		537
	See Act No. IV of 1882, section 82	549
COURT FEE, See Act No. VII of 1870, section 7, IX; schedule I		447
	section 10	151
	section 10(2)	197
(vi)	section 11, schedule II, article	559

	Page.
COURT FEE, <i>See</i> Act No. VII of 1870, section 17	186
CRIMINAL BREACH OF TRUST, <i>See</i> Act No. XLV of 1860, section 405	28, 260
..... <i>See</i> Criminal Procedure Code section 234	69
CRIMINAL PROCEDURE CODE, SECTIONS 87, 88 AND 89— <i>Absconding offender—Sale of property of absconder—Illegal sale—Suit to recover property sold from auction purchaser—Jurisdiction.</i> Where the property of an absconding offender was attached and sold by a Court purporting to act under section 88 of the Code of Criminal Procedure and it turned out that the procedure culminating in the sale was irregular and illegal, it was held that the Civil Courts had jurisdiction to entertain a suit by the owner of property so sold to recover the same in the hands of a purchaser.	
Mian Jan v. Abdul, I. L. R., 27 All.	572
..... SECTIONS 107 AND 110, <i>See</i> Review...	92
..... SECTIONS 107, 118 AND 406— <i>Security for keeping the peace—Appeal.</i> Held that no appeal will lie from an order under section 118 of the Code of Criminal Procedure requiring security to be furnished for keeping the peace.	
Chet Ram. In the matter of the petition of—, I. L. R., 27 All.	628
..... SECTION 110 — <i>Security for good behaviour—The taking of sureties without personal bonds or recognizances illegal.</i> Held that there is no provision of law by which a person required to find security to be of good behaviour can be called upon to provide sureties for his good behaviour without at the same time entering into his own bond for that purpose.	
Emperor v. Udari, I. L. R., 27 All....	262
..... SECTIONS 110, 112, 130, 191 and 526— <i>Transfer—Security for good behaviour.</i> Where a Magistrate refused to admit to bail a person against whom proceedings were pending under section 110 of the Code of Criminal Procedure on the ground that "the accused is said to be a dangerous and violent man, who might use his liberty for the purpose of intimidating witnesses," the High Court declined to direct a transfer of the proceedings. Magistrates are left a very wide discretion as to the kind of information upon which they may act in instituting proceedings under Chapter VIII of the Code, and they are not bound to disclose its source. The provisions of section 130 (c) and section 191 do not apply to such proceedings.	
Mithu Khan. In the matter of the petition of—I. L. R., 27 All.	172
..... SECTIONS 110 and 118— <i>Security for good behaviour—Delegation of inquiry into sufficiency of security.</i> Held that it is not competent to a Magistrate who has passed an order under section 118 of the Code of Criminal Procedure to delegate to another officer the duty of inquiring into the sufficiency of the security tendered, but such inquiry must be made by the Court by which the original order was passed. <i>Queen-Empress v. Pirthipal Singh</i> , Weekly Notes, 1898, p. 154, and <i>Emperor v. Tota</i> , I. L. R., 25 All., 272, followed.	
Emperor v. Balwant, I. L. R., 27 All.	298

	Page.
CRIMINAL PROCEDURE CODE, SECTION 145, <i>See</i> Act No. XLV of 1860, section 434	300
SECTIONS 145(1) AND (439) (B)— <i>Revis- sion—Jurisdiction to interfere with an order purporting to be passed under section 145</i> ] Where an order purporting to be passed under section 145(1) of the Code of Criminal Procedure after evidence recorded which satisfied the Magistrate that there existed a dispute likely to occasion a breach of the peace in respect of certain immovable property was found to be insufficient or defect- ive in the sense that it gave no information as to the subject of the dispute and left the persons to whom it was issued quite in the dark as to the property in regard to which they had to set forth their respective claims, it was <i>held</i> that the inadequacy of such order gave the High Court jurisdiction to interfere. <i>Mohesh Sewar v. Narain Bag</i> , I. L. R., 27 Calc., 981, and <i>Sakra Dasadh v. Ram Pergash Singh</i> , I. L. R., 30 Calc. 443, followed.	
Martin. In the matter of the petition of T. A.—, I. L. R., 27 All.	296
SECTION 162, <i>See</i> Act No. I of 1872,	
section 165	469
SECTION 195, <i>See</i> Act No. V. of 1861,	
SECTION 4(2)	292
SECTION 234— <i>Act No. XLV of 1860, section 409—Criminal breach of trust Form of charge.</i> ] In a charge of criminal misappropriation there were three counts. Each count specified the sum of money alleged to have been misap- propriated by the accused on a particular day; but in two out of the three cases the total sum consisted of three separate items in each instance. <i>Held</i> that a charge so framed did not offend against section 234 of the Code of Criminal Procedure. <i>King- Emperor v. Gulzari Lal</i> , I. L. R., 24 All., p. 254, followed.	
Emperor v. Ishtiaq Ahmad, I. L. R., 27 All.	69
SECTIONS 443 <i>et seqq.</i> — <i>European British subject—Claim of status as a European British subject without claim to be tried by a jury—District Magistrate— Jurisdiction.</i> ] One G. P. who was sent for trial before a District Magistrate on a charge of rioting under section 147 of the Indian Penal Code, claimed that he was a European British subject but did not ask to be tried by a jury. The Magistrate after inquiry found that G. P. was not a European British subject, tried and convicted him under section 147, but passed upon him a sentence, which as District Magistrate he could legally have passed upon a European British subject. G. P. appealed to the Sessions Judge. The Sessions Judge, on the question being again raised, found that G. P. was a European British subject, and thereupon set aside his con- viction and sentence and directed that he should be retried by the District Magistrate. <i>Held</i> that this procedure was erroneous. Inasmuch as the appellant had never claimed to be tried by a jury, and the Magistrate who had tried and convicted him was compe- tent to try him as a European British subject and had passed a sentence which was not in excess of his powers as a Magistrate trying a European British subject, the Sessions Judge on finding that the appellant was a European British subject should have gone on and heard his appeal on the merits. <i>Empress of India v. Berrill</i> , I. L. R., 4 All. 141, distinguished.	
Emperor v. George Powell, I. L. R., 27 All.	397

**CRIMINAL PROCEDURE CODE, SECTION 439—Revision—Practice—**  
*Order of acquittal.*] Although the High Court has the power to interfere in revision with an original or appellate judgment of acquittal, it will ordinarily not do so.

Qayyum Ali v. Faiyaz Ali, I. L. R., 27 All. ... .. 359

**SECTION 439—Revision—Practice—**  
*Discretion of Court.*] Unexplained delay in applying for revision of an order passed to the prejudice of the applicant is a reason for the High Court, in the exercise of its discretion, declining to interfere.

Emperor v. Jagan Nath, I. L. R., 27 All. ... .. 468

**SECTIONS 439 AND 522—Revision—**  
*Powers of High Court—Reversal of order under section 522.*] Held that under section 439 and section 423 (1) (d), the High Court has power, as a Court of revision, to reverse an order passed by a subordinate Court under section 522 of the Code of Criminal Procedure. *Ram Chandra Mistry v. Nobin Mirza*, I. L. R., 25 Cal., 680, distinguished.

Manki v. Bhagwanti, I. L. R., 27 All. ... .. 415

**SECTION 488—Maintenance—Effect of**  
*Civil Court decree in a suit for restitution of conjugal rights upon an order for maintenance passed by a Magistrate.*] A husband, against whom an order had been passed by a magistrate under section 488 of the Code of Civil Procedure directing him to pay a monthly allowance of Rs. 4-8 for the maintenance of his wife, brought a suit against his wife for restitution of conjugal rights. The suit was compromised, and a consent decree passed whereby the petitioner was to pay the respondent Rs. 4-4 per mensem and to provide a house for her to live in near his own. Held that this decree of the Civil Court superseded the order of the Magistrate passed under section 488 of the Code of Civil Procedure. *In re Bulakidas*, I. L. R., 23 Bom., 484, followed.

Nur Muhammad v. Ayesha Bibi, I. L. R., 27 All. ... .. 488

**SECTIONS 488 AND 489—Maintenance of**  
*child—Power to cancel an order for maintenance.*] Held that where an order has once been passed by a competent Court under section 488 for the payment of maintenance for a child, the only power that exists of modifying such an order is that given by section 489 of the Code.

Budhni v. Dabal, I. L. R., 27 All. ... .. 11

**SECTIONS 517, 520—Order for the disposal of property regarding which an offence has been committed—**  
*Half currency notes.*] When a question arises between two persons who shall bear a loss resulting from the fraud of a third, the one who has been guilty of negligence shall suffer. Hence where A made over to B halves of certain currency notes as security for payment to B of the price of goods delivered, having previously parted with the other halves to C, it was held that B was entitled to recover possession of the halves originally made over to him, from C, to whom they had been delivered under an order of the Court, or to obtain compensation from C, if C had parted with them, inasmuch as it was C's negligence which enabled A to perpetrate a fraud upon B. *Foster v. Green*, 7 H and N., 881 followed.

Abdur Razzaq v. Rahmat-ullah, I. L. R., 27 All. ... .. 680

**SECTION 522, See 16, section 439 ... .. 415**



CRIMINAL PROCEDURE CODE, SECTION 550—*Meaning of "personally interested"*—*Sub-Committee of Municipal Board advising a prosecution.*—*Held that a Magistrate, who had been a Member of a Sub-Committee of a Municipal Board which recommended the prosecution of a certain person for an alleged obstruction caused by him in a public thoroughfare, was not, by reason only of this fact, "personally interested" in the case afterwards initiated against such person so as to be debarred under section 556 of the Code of Criminal Procedure from trying it. The Queen v. Handaley, L. R., 8 Q. B. D., 383 referred to.*

Emperor v. Mohan Lal, I. L. R., 27 All. ... 25

SECTION 556—*Meaning of "personally interested"*—*Magistrate making himself a witness in a case which he is trying.*—*On a day when the Courts were closed for the Christmas holidays two persons came to a Magistrate's private house, and there made an oral complaint to him. When the Courts reopened the same persons filed a written complaint in the Magistrate's Court, which resulted in certain persons being put upon their trial before the same Magistrate for an offence under section 323 of the Indian Penal Code. During the course of the trial the Magistrate considered it his duty to record his own evidence as to the circumstances attending the making of the oral complaint at his house, and he was duly cross-examined and re-examined. Held that the Magistrate could not be considered to be "personally interested" in the case within the meaning of section 556 of the Code of Criminal Procedure. In the matter of petition of Ganeshi, I. L. R., 15 All., 192, and The Queen v. Handaley, I. R., 8 Q. B. D., 383 followed. Hari Kishore Mitra v. Abdul Razi Miah, I. L. R., 21 Cal., 320, Girdhar Chandra Ghosh v. Queen-Empress, I. L. R., 20 Cal., 857, Queen-Empress v. Mankam, I. L. R., 19 Mad., 263, and Serjeant v. Dale, I. R., 2 Q. B. D., 538, referred to.*

Emperor v. Nanhu, I. L. R., 27 All. ... 33

CRIMINAL TRESPASS, *See* Act No. XLV of 1860, section 441 ... 298

CUSTOM, *See* Hindu law... ... 303

— *See* Land-holder and tenant ... 81, 338, 356, 556

DECLARATORY DECREE, *See* Act No. I of 1877, section 42 ... 138

DECREE, *See* Civil Procedure Code, sections 2 and 244 ... 380

— Amendment of—*See* Civil Procedure Code, section 206 ... 576

— Form of—*See* Civil Procedure Code, section 215A ... 374

— section 244... ... 325

— *See* Joint property ... 88, 153

— *See* Pre-emption ... 465

DEFENDANT, *Pro forma*—, *See* Civil Procedure Code, section 13 ... 59

DEFINITION, *See* Act No. XLV of 1860, section 170 ... 294

— section 405 ... 28, 260

— section 415 ... 561

— sections 417, 420 ... 302

— section 434 ... 300

## xiv

	Page.
DEFINITION, <i>See</i> Act No. XLV of 1860, section 441	298
DISCRETION OF COURT, <i>See</i> Act No. I. of 1877, section 22	678
..... <i>See</i> Act No. I of 1877, section 42	138
..... <i>See</i> Civil Procedure Code, section 584	688
DISTRAINT, <i>See</i> Act No. XLV of 1860, section 180	499
ENDOWMENT, <i>See</i> Hindu law	581
ESTOPPEL, <i>See</i> Act No. XII of 1881, section 93	569
..... <i>See</i> Civil Procedure Code, section 287	684
..... <i>See</i> Parties	23
..... <i>See</i> Pre-emption	544
EUROPEAN BRITISH SUBJECT, <i>See</i> Criminal Procedure Code, sections 443 <i>et seqq.</i>	397
EVIDENCE <i>See</i> Act No. III of 1867, section 1	567
..... <i>See</i> Act No. I of 1872, section 102	71
..... Admissibility of—, <i>See</i> Act No. I of 1872, section 92	612
EXECUTION OF DECREE, <i>See</i> Act No. XV of 1877, section 7	704
..... sections 7 and 8	67
..... schedule II, article	
179	619
..... <i>See</i> Act No. IV of 1882, sections 88 and	
89	625
<i>Attachment of debts due to judgment-debtors—Improper realization of such debts by third party—Application to compel third party to disgorge—Limitation—Contempt of Court.</i>	
[Certain plaintiffs attached before judgment some debts due to the defendants. The defendants sold the right to collect those debts to third parties, who, in defiance of the attachment, proceeded to collect some of them for their own benefit. The plaintiffs having obtained a decree in their suit, applied to the Court to compel the third parties to pay into Court the money which they had improperly collected in defiance of the Court's order. <i>Held</i> that this was not an application in execution of their decree, but an application to the Court to exercise its inherent power of punishing for contempt of Court, and that the limitation rules provided for applications to execute decrees did not apply to it.]	
Godu Ram v. Suraj Mal, I. L. R., 27 All.	378
..... <i>See</i> Civil Procedure Code, section 13	148
..... section 206	575
..... section 244	155
..... section 244	325
..... section 244	485
..... section 244	702
..... section 278	700
..... section 283	440
..... section 285	56
..... section 295	132
..... section 295	153

	Page.
EXECUTION OF DECREE, <i>See</i> Civil Procedure Code, sections 810A, 688 ... ..	268
and 815 ... ..	537
section 817...	194
section 817...	443
section 881	453

*Limitation Act (XI) of 1877, Indian Limitation Act) Schedule II, Article 179—Suspension of execution proceedings—Revival of pending execution suspended not by act or default of the decree-holder.]* On 24th August 1888 an application was made for execution of a decree, and on 18th December 1888 execution was allowed to proceed. On 29th November 1889 it was ordered that the case should be struck off the file and the record transferred to the Court of the Collector for execution. On 23rd December an order was made that as the decree-holder had not made a deposit on account of the transfer to the Collector, "therefore in default of prosecution on the part of the decree-holder the record be not sent to the Collector's Court." On 15th February 1889 an appeal had been preferred to the High Court from the order of 18th December 1888 allowing execution to proceed, and the High Court reversed that order on 7th January 1890, but on appeal to the Privy Council the order allowing execution was restored on 12th December 1894. *Held* by the Judicial Committee (affirming the decision of the High Court) that an application for execution made on 23rd November 1897 was one to revive and carry through a pending execution suspended by no act or default of the decree-holder, and not an application to initiate a new one, and was therefore not barred by limitation.

The order of 29th November 1889, was one in aid of execution and that of 23rd December was in no sense a final order; if the appeal from the order of 18th December 1888 and the proceedings up to the order of the Privy Council of 12th December 1894 had not intervened there was nothing in its terms to preclude the decree-holder from coming again to the Court and, after satisfying the conditions indicated in the order, obtaining the transmission of the case to the Collector's Court.

Qamar-ud-din Ahmad v. Jawahir Lal, I. L. R., 27 All. ... 334

*See* Mortgage ... .. 392

*Sale confirmed without objection in part of judgment-debtor—Private sale by heirs of judgment-debtor to a third party—Rights of purchasers inter se.]* In execution of a decree for sale on a mortgage the interest of the judgment-debtor in the whole of certain property instead of in half only, which was all that was mortgaged, was sold. The sale was confirmed, possession was delivered and mutation proceedings took place in favour of the purchaser. The judgment-debtor, though having full knowledge of these proceedings, took no objection, but allowed the purchaser's name to be recorded in respect of the whole property. Subsequently the heirs of the judgment-debtor sold half of the property in question to one P, who brought a suit to recover possession thereof from the auction purchaser. *Held* that inasmuch as P, if he had made any sort of inquiry, would have become aware of the true state of the title to the property which he was purchasing, he could not be regarded as a *bona fide* purchaser, and was not in equity entitled to succeed as against the auction purchaser.

Baldeo Prasad v. Fakhr-ud-din, I. L. R., 27 All. ... 62

FORECLOSURE OF MORTGAGE, <i>See</i> Act No. IV of 1882, sections 86 and 87 ...	501
FRAUD. Application to set aside sale on the ground of— <i>See</i> Civil Procedure Code, section 244 ...	704
GIFT, <i>See</i> Hindu Law ...	364
HIGH COURT. Powers of review of—in criminal cases, <i>See</i> Review ...	92

**HINDU LAW—Adoption—Adoption by widow, under authority from her husband, of her brother's grandson.]** The rule of Hindu law that a Hindu cannot adopt a child whose mother he could not lawfully have married does not apply *converso* to the case of an adoption made by a widow under authority from her deceased husband, such an adoption being in law an adoption made by the widow as agent on behalf of her husband. The adoption therefore by a Hindu widow, in virtue of a written authority to adopt given to her by her deceased husband of her brother's grandson (or son) is not according to Hindu law an invalid adoption. *Musammal Battas Kuar v. Lachman Singh*, N.-W. P., H. C. Rept., 1875, p. 117, discussed. *Sriramulu v. Ramayya*, I. L. R., 3 Mad 15, *Ragavendra Rau v. Jayaram Rau*, I. L. R., 20 Mad., 283, and *Bai Nani v. Chunilal*, I. L. R., 22 Bom., 973, followed. *Bhagwan Singh v. Bhagwan Singh*, I. L. R., 17 All., 294 and 21 All., 412, and *Chowdry Padum Singh v. Koer Oodey Singh*, 12 Moo., I. A., 350, referred to.

Jai Singh Pal Singh v. Bijai Pal Singh, I. L. R., 27 All. ... 417

**Endowment—Succession to property of mahant—Chela—Succession in management of endowed property under deed of endowment—Mortgage by manager—Money advanced out of profits of dedicated property—Right of successor to sue on mortgage.]** A mortgagor who was the mahant of an order of bairagis or religious mendicants, by a deed of endowment dedicated certain self-acquired property to the service of an idol, of which he made himself trustee and manager, and nominated and appointed the plaintiff, who was his chela, to succeed him on his death in the trusteeship and management. In a suit on the mortgage the evidence showed that the money advanced to the defendant was part of the profits of the estate so dedicated. *Held* by the Judicial Committee (reversing the decision of the Court of the Judicial Commissioner of Oudh) that the plaintiff on his succession was entitled as such trustee and manager to maintain the suit and recover the money due by the defendant on the mortgage.

Bishambar Das v. Drigbijai Singh, I. L. R., 27 All. ... 581

**Family custom—Impartible raj—Separate acquisitions of holder of impartible raj—Presumption.]** One Raja Fateh Sahi was the owner of a "raj-riasat" to which by family custom the incidents of primogeniture and impartibility applied, the younger sons receiving portions of the estate by way of "babuai" allowance. The bulk of the property of the riasat was situate in the district of Saran, but there was also a not inconsiderable portion in the district of Gorakhpur. After the battle of Buxar, in 1764, the property in Saran was confiscated by the British Government; but the Gorakhpur property was then in territory belonging to the Nawab Wazir of Oudh, which was not ceded to the British Government until 1801. *Held* that the application of the customs of primogeniture and impartibility to the Gorakhpur property was unaffected by the confiscation of the property in Saran; and *semble* that even if (which, however, was found not to have been the case) the Gorakhpur property had been altogether acquired after confiscation of the property in

Saran, these customs, being part of the personal law of the family, would still govern such after-acquired property.

It is of the essence of family usages that they should be certain, invariable and continuous, and well established discontinuance must be held to destroy them. Where, however, such a custom has been proved, the onus is upon the party who alleges the discontinuance thereof to prove that fact. *Raj Krishna Singh v. Ramjoy Surma Mazoomdar*, 1. L. R., 1 Cal., 186, and *Sowendra Nath Roy v. Musammal Heeromonee Burmoneah*, 12 Moo., 1. A., 81, referred to. But such a discontinuance was held not to be established by one instance in which a female having no title had usurped possession of the family property and had then gone through the form of making, by way of a compromise, a gift of it to the rightful heir, there being otherwise clear and consistent evidence of the existence of the custom.

A compromise between members of a Hindu family whereby "babui" allowance is fixed and a dispute with regard to the family property is terminated will, if just and legal, be binding on the minor children of the parties thereto. *Pitam Singh v. Ujagar Singh*, 1. L. R., 1 All., 651, and *Chandrapa v. Danava*, 1. L. R., 19 Bom., 598, referred to.

If the owner of an estate the devolution of which is governed by family custom acquires separate property, but does not in his life-time alienate the property so acquired, or dispose of it by his will, or leave behind him some indication of a contrary intention, the reasonable presumption is that he intended to incorporate it with the family estate. *Lakshmiipathi v. Kondasami*, 1. L. R., 16, Mad., 54, and *Ramasami Kamaya Nair v. Sundara Lingasami Kamaya Nair*, 1. L. R., 17 Mad., 422, referred to.

*Sarabjit Partap Bahadur Sahi v. Indarjit Partap Bahadur Sahi*, 1. L. R., 27 All. ... ..

203

**HINDU LAW—Gift to wife—Powers of alienation of donee—Construction of document.** Ordinarily a gift by deed or will by a Hindu to his wife does not carry the absolute interest in the absence of some indication of an intention that she should have such absolute interest in the property.

A conveyance executed by a Hindu transferring certain property to his wife, after reciting that the executant was in possession as proprietor of shares in certain villages, declared that he of his own free will transferred the share of which he was proprietor to his wife and "put her in proprietary (malikana) possession authorizing her to retain possession of the same as proprietor (malik), together with land revenue, miscellaneous items, &c." Then came this provision:—"In case of proper necessity she as my representative is at liberty in every respect to transfer the property by sale or mortgage, either in my life-time or after my death. No objection taken by any person shall be held as fit to be allowed in this respect.

*Held*, that notwithstanding the use of the word "malik," the document did not confer an absolute power of alienation on the donee, but she was not empowered to transfer the property either by sale or mortgage unless a legal necessity arose for doing so. *Lalit Mohan Singh Roy v. Chukkun Lal Roy*, 1. L. R., 24 Cal., 834, referred to.

*Jamna Das v. Ramautar Pande*, 1. L. R., 27 All. ... ..

264

**Hindu widow—Sale by widow of deceased husband's property, partly for legal necessity and partly not—Suit by next reversioner to recover property on death of widow—Limitation**



—*Act No. XV of 1877 (Indian Limitation Act), schedule II, article 141*] A separated Hindu died leaving him surviving, his mother, two widows and a daughter. After the death of the mother and the widows, the daughter sued to recover certain property which had belonged to her father, but had been sold, by means of two sale-deeds, after his death by one of his widows. On the finding that one of the sales had been effected partly for legal necessity and partly not, and the other not for legal necessity, the Court decreed the plaintiff's claim as to the first sale on payment of such amount of the consideration for the sale as were supported by legal necessity, and as to the second sale unconditionally. On the finding that the suit was brought within twelve years from the date of the death of the widows, who both survived the plaintiff's grandmother it was held that the suit was not barred by limitation. *Gorind Singh v. Baldeo*, I. L. R. 25 All., 330, and *Jhamman Kunwar v. Tiloki*, I. L. R., 25 All., 435, followed.

• *Ram Dei Kunwar v. Abu Jafar*, I. L. R., 27 All. ...

494

HINDU LAW—*Joint Hindu family—Personal decree against father—Liability of son's interests in the joint family property.*] When the joint ancestral property of a Hindu family is attached in execution of a personal decree obtained against the father of the family, the interests of the sons can only be exempted from attachment and sale if the latter can show that the debt in respect of which such decree was obtained was either tainted with immorality or was such a debt as it was not the pious duty of the sons to pay. *Ram Dyal v. Durga Singh*, I. L. R., 12 All., 209, overruled. *Beni Madho v. Basdeo Patak*, I. L. R., 12 All., 99, *Meenakshi Naidu v. Immudi Kanaka Ramaya Kounden*, I. L. R., 16 I. A., 1, and *Mussamat Nanomi Babuasia v. Modun Mohun*, I. L. R., 13 I. A., 1, referred to.

*Karan Singh v. Bhup Singh*, I. L. R., 27 All. ...

16

—*Suit for restitution of conjugal rights—Plaintiff's suit not barred by his being out of caste.*] Held that to bar a suit brought by a Hindu for restitution of conjugal rights, the defendant must set up some offence of a matrimonial nature such as would support a decree for judicial separation. It is not a defence that the plaintiff is out of caste, nor ought a decree to be made conditioned on the plaintiff being restored to caste. *Paigi v. Shao Narain*, I. L. R., 8 All., 78, and *Binda v. Kaunsilia*, I. L. R., 13 All., 126 referred to.

*Sahadur v. Rajwanta*, I. L. R., 27 All. ...

96

—*See Act No. IX of 1872, section 230* ...

361

—*See Vendor and purchaser* ...

271

HINDU WIDOW, *See Hindu Law* ...

494

IMMOVABLE PROPERTY, *See Act No. III of 1877, sections 3 and 17* ...

462

IMPARTIBLE RAJ, *See Hindu Law* ...

203

INJUNCTION, *See Act No. I of 1877, section 42* ...

406

—*See Civil Procedure Code, section 584* ...

684

INSANITY, *See Act No. IX of 1872, section 12* ...

1

INSOLVENCY, *See Pre-emption* ...

670

INTEREST, *See Construction of document* ...

351

INTERPRETATION OF DOCUMENT, *See Pre-emption* ...

12

—*See Pre-emption* ...

553

JOINT HINDU FAMILY, *See Act No. IX of 1872, section 230* ...

361

	Page.
JOINT HINDU FAMILY, <i>See</i> Hindu law	16
JOINT PROPERTY— <i>Dispossession of some of the co-owners by others</i> — <i>Suit for recovery of joint possession—Form of decree.</i> ] Where certain of the co-owners of immovable property had been prevented by some of the other co-owners from exercising their legal rights in respect of the joint property, it was held that the dispossessed co-owners were entitled to a decree that they should be restored to joint possession of the joint property, and not merely to a decree declaring their right to joint possession. <i>Rohaan Rai v. Saray Rai</i> , Weekly Notes, 1904, p. 106, followed. <i>Watson &amp; Co. v. Ramchand</i> <i>Dutt</i> I. L. R., 18 Cal., 10, and <i>Rohman Chaudhri v. Salamat Chau-</i> <i>dhuri</i> , Weekly Notes, 1901, p. 48, referred to.	
<i>Ram Charan Rai v. Kanleshar Rai</i> , I. L. R., 27 All.	153
<i>Exclusive dealing with joint property by one of</i> <i>the co-owners—Remedy of the other co-owners—Form of decree.</i> ] Upon the death of the tenant of land which was the property of four persons jointly, one of the co-sharers took possession of the tenant's holding and commenced to cultivate it himself. The remaining co-sharers brought a suit to recover possession— apparently actual physical possession—of three-quarters of the tenant's holding thus occupied by the defendants. <i>Held</i> that the decree to which the plaintiffs were entitled was a decree declaring that they and the defendant were joint owners of the land in dispute, and that the plaintiffs were, as such joint owners, entitled to an account of the profits of the land. <i>Bhola</i> <i>Nath v. Baskin</i> , Weekly Notes, 1904, p. 127, <i>Ram Jaton Shukul v.</i> <i>Jainar Shukul</i> , Weekly Notes, 1904, p. 106, and <i>Rohman Chaudhri v.</i> <i>Salamat Chaudhuri</i> , Weekly Notes, 1901, p. 48, referred to. <i>Rohaan</i> <i>Rai v. Saray Rai</i> , I. L. R., 26 All., 688, distinguished.	
<i>Jagar Nath Singh v. Jai Nath Singh</i> , I. L. R., 27 All.	88
JOINT TENANTS, <i>See</i> Construction of document	310
JURISDICTION, <i>See</i> Act No. IX of 1887, schedule II, article 28	622
<i>See</i> Civil Procedure Code, section 286	56
<i>See</i> Criminal Procedure Code, sections 87, 88 and 89	572
<i>See</i> sections 443 et seqq...	397
<i>See</i> section 556	25, 33
<i>See</i> Execution of decree	62
(Civil and Revenue Courts), <i>See</i> Act (Local) No. II of 1901, sections 79 and 81	372
LAMBARDAR AND CO-SHARER, <i>See</i> Act No. III of 1877, section 17	564
<i>See</i> Adverse possession	436
LAND-HOLDER AND TENANT— <i>Accommodation provided in the</i> <i>abadi for agricultural tenant—Suit for ejectment—Custom.</i> ] Some agricultural tenants had been occupying a room in an inclosure in the <i>abadi</i> for thirty years. <i>Held</i> on suit by the zamindar to eject them that the plaintiff had no cause of action; either the defendants had acquired a title by adverse possession, or if their possession was permissive, they could not according to custom be ejected while their tenancy was still undetermined.	
<i>Nazir Hasan v. Shibba</i> , I. L. R., 27 All.	81
<i>Custom—Rights of land-holder in</i> <i>the abadi—Transfer of house site by tenant.</i> ] Apart from any custom recorded in the <i>wajib-ul-arz</i> forbidding a tenant to	

transfer the site of a house occupied by him in the abadi, a tenant has not, in the absence of a special custom or contract giving him such a right, any right to transfer the site of his house in the abadi.

Shajan Lal v. Muhammad Abdus Samad Khan, I. L. R., 27 All. ... 556

LAND-HOLDER AND TENANT—*Occupancy tenant—Usufructuary mortgage—Relinquishment of tenancy during the term of the mortgage.*] Held that an occupancy tenant who has made a usufructuary mortgage of his holding and put the mortgagee in possession cannot during the subsistence of such mortgage relinquish his holding to the prejudice of the mortgagee's rights. *Badri Prasad v. Sheodhan*, I. L. R., 18 All., 354, followed.

Rannu Rai v. Rafi-ud-din, I. L. R., 27 All. ... 82

*Rights in respect of building sites in the abadi—Customary law—Wajib-ul-arz—Unauthorized building—Acquiescence.*] The plaintiff, who was the receiver of the estate of a minor, situate in the district of Bulandshahr, resided at Calcutta, the property in Bulandshahr being managed through a karinda whose authority was strictly limited by a power of attorney. In 1894, two tenants of the village Sankhni, in which the minor was a co-sharer, sold their house in the abadi by means of a registered sale-deed. The vendee was put into possession, and proceeded, between 1894 and 1896 to spend a considerable sum of money in building a "pacca" house on the site of the house so purchased. It did not appear that he made any inquiries from the karinda of the plaintiff as to his rights or asked for any permission to build the house. On the other hand the karinda took no steps to interfere with the building. The wajib-ul-arz of the penultimate settlement of the village contained these provisions:—"Without our consent nobody can settle in any place possessed by us (i.e., the zamindars)," and again:—"A ryot occupying any house cannot be turned out of it by anybody so long as he lives in it, but he is not empowered to alienate the site. He can remove and sell the materials of the building constructed by him." In January 1902 the plaintiff brought the present suit asking that the principal defendant (the purchaser) might be ordered to remove the materials of the house erected by him within a time to be fixed by the Court, failing which they might be declared to be the property of the plaintiff.

Held by ATKMAN, J., that the conduct of the plaintiff's karinda under the circumstances amounted to an acquiescence in the acts of the principal defendant and was binding on his principal the plaintiff. *Ramsden v. Dyson*, I. L. R. 1 E. and I. A., 129, and *Sri Girdhariji Maharaj v. Chote Lal*, I. L. R., 20 All., 248, referred to.

Per KNOX, ACTING C.J., *Contra*.—The principal defendants, vendors, had no right to sell anything more than the materials of their house: no title to the site passed to the purchasers, and under the circumstances the inaction of a karinda whose authority was limited could not be taken to bind the plaintiff. *Chajju Singh v. Kanbia*, Weekly Notes, 1881, p. 114, *Sri Girdhariji Maharaj v. Chote Lal*, I. L. R., 20 All., 248, and *Ramsden v. Dyson*, I. L. R., 1 E. and I. A., 129, referred to.

Raj Narain Mittar v. Budh Sen, I. L. R., 27 All. ... 338

*Rights of tenants in the village abadi—Wajib-ul-arz—Suit to remove building erected by tenant*

*without permission of the zamindars.] In the courtyard of a tenant lawfully in possession of a house site in the village abadi was "some sort of a thatched shed" used in fact by the tenant and other Muhammadans of the village for the purpose of religious observances. The wajib-ul-arz of the village provided that "no cultivator can build a new 'house' outside the compound of his dwelling house without the permission of the zamindar. He is at liberty to do so in his compound. Held that the tenant in question was not at liberty to convert the thatched shed in his courtyard into a "pacca" mosque without the permission of the zamindars.*

Basa Mal v. Ghayas-ud-din, I. L. R., 27 All. ...	356
LEASE, <i>See</i> Act No. IV of 1882, section 107 ...	186
----- <i>See</i> Construction of document ...	190
----- <i>See</i> Specific performance ...	696
----- of mortgaged property. <i>See</i> Mortgage ...	313
LIMITATION— <i>Adverse possession—Suit to recover profits of sfr land in an undivided mahal.] In a suit to recover his share of the profits of certain sfr land appertaining to an undivided mahal the plaintiff had not been in receipt of profits in respect of the sfr land in suit for more than twelve years; but he and his predecessor in title had been in receipt of their shares of the rents and profits of the undivided mahal, other than of the particular sfr land in question, continuously.</i>	
<i>Held that the mahal being undivided, the defendant's possession of the sfr land, the profits of which were claimed, had never really been possession hostile to the plaintiff, and the suit was therefore not barred by limitation.</i>	
Raj Bahadur v. Bharat Singh, I. L. R., 27 All. ...	348
----- <i>See</i> Act No. VII of 1870, section 10(2) ...	197
----- section 28 ...	411
----- <i>See</i> Act No. XV of 1877, section 7 ...	704
----- sections 7 and 8 ...	67
----- section 13; schedule II, articles 10 and 120 ...	540
----- schedule II, article 144 ...	395
----- schedule II, article 179 ...	619
----- <i>See</i> Act No. IV of 1882, sections 86 and 87 ...	501
----- sections 88 and 89 ...	625
----- <i>See</i> Act No. VI of 1882, sections 58 <sup>f</sup> , 147 and 169 ...	509
----- <i>See</i> Act (Local) No. II of 1901, sections 79 and 81 ...	372
----- <i>See</i> Adverse possession ...	436
----- <i>See</i> Civil Procedure Code, section 206 ...	575
----- sections 278 and 283 ...	464
----- section 244 ...	485
----- <i>See</i> Execution of decree ...	334
----- ...	378
----- <i>See</i> Hindu Law ...	494
----- <i>See</i> Trust ...	513
LIS PENDENS, <i>See</i> Pre-emption ...	544

	Page.
MAINTENANCE, <i>See</i> Criminal Procedure Code, section 488 ...	483
<i>See</i> Criminal Procedure Code, sections 488 and 489 ...	11
MINORITY, <i>See</i> Act No. XV of 1877, section 7 ...	704
<i>See</i> Act No. XV of 1877, sections 7 and 8 ...	67

MORTGAGE—*Prior and subsequent incumbrances—Sale under decree on puisne mortgage notifying prior incumbrances—Purchase by decree-holder—Prior incumbrances declared invalid—Suit by owner to recover from decree-holder, auction purchaser, the amount due on the prior incumbrances.* Certain villages were put up to sale in execution of a decree under section 88 of the Transfer of Property Act, 1882, and it was notified in the proclamation of sale issued under section 287 of the Code of Civil Procedure that there were two prior mortgages on the property to be sold of the 25th of May and the 2nd of December 1877 respectively. The holder of the decree under execution obtained leave from the Court to bid at the sale, and purchased eight villages at a very low figure. Meanwhile, as the result of suits on the two mortgages of 1877, those mortgages were declared to be invalid. Subsequently the person entitled to the proprietary rights in the mortgaged property sued to recover from the auction purchaser and her representatives in interest the amounts due on the two mortgages of 1877.

*Held by STANLEY, C. J., and BLAIR, J. (Dissentiente BURKITT, J.) that what the decree-holder, auction purchaser, purchased was only the equity of redemption in the mortgaged property and not the whole of the proprietary rights therein. The prior mortgages of 1877 having been found to be invalid, the rightful owner of the property was in equity entitled to recover from such purchaser of the equity of redemption such amount of the principal and interest secured by those mortgages as was proportionate to the value of the property the equity of redemption in which had been purchased. Simbhu Nath Panday v. Golub Singh, I. R., 14 I. A., 77, Pettachi Chettiar v. Sangili Veera Pandia Chinnathambiar, I. R., 14 I. A., 84, and Abdul Aziz Khan v. Appayasami Naicker, I. R., 31 I. A., 1, referred to.*

*Per BURKITT, J., contra :—*Whether or not in a properly framed suit tendering the amount due on the auction purchaser's mortgage and the amount paid by the auction purchaser for the property bought by her, the plaintiff could recover possession of the property mortgaged, in the present suit, which was framed as a suit, for the recovery of unpaid purchase money, no decree for the payment of the amounts due on the prior mortgages could be passed. A notification by a Court executing a decree for sale of immovable property that the property about to be sold is incumbered does not guarantee that the incumbrances notified are valid incumbrances of that they are the only incumbrances on the property; nor in this case was there anything in the conduct of the auction purchaser which stopped her from denying the validity of the prior mortgages. The auction purchaser was entitled to retain the benefit of bargain which she had secured.

Inayat Singh v. Izzat-un-nissa Begam, I. L. R., 27 All. ... 97

*Prior and subsequent incumbrances—Rights of puisne mortgagee paying off a prior mortgage.* On the 2nd of June 1863 Bikram mortgaged certain property by way of simple mortgage to Narain Singh. On the 17th of June 1873 Rup Singh, one of the sons of Bikram, made a usufructuary mortgage of the property in favour of Tula Ram and Cheda Lal. In 1879 Narain Singh obtained a decree on his mortgage, to which, however, the second



mortgagees were not parties, and the property was brought to sale and was purchased by his heirs. The auction purchasers, heirs of Narain Singh, thereupon sued the second mortgagees to recover possession of the shares purchased by them and obtained a decree upon the 21st of August 1889. Thereupon the heirs of the second mortgagees sued the heirs of Narain Singh, the first mortgagee, to redeem the mortgage of 1863, and got a decree on the 24th of June 1890. Finally, Kirat and another, purchasers of the interests of Kup Singh and some of his brothers, purchasers of a simple money decree, sued to recover possession of the property comprised in the mortgage of 1873 upon payment only of the amount due on that mortgage. *Held* that the plaintiffs could not succeed without also paying off the amount due under the prior mortgage of 1863.

Kirat v. Debi Singh, I. L. R., 27 All. ...

308

**MORTGAGE—Redemption—Execution of decree—Redemption money paid into Court, but part subsequently withdrawn in execution of plaintiffs' decree for costs.** Where the full amount fixed by the Court in a decree for redemption of a mortgage was paid into Court within the time limited by the decree, it was held that the plaintiffs mortgagees did not lose their right to possession of the mortgaged property by the fact of their having attached and withdrawn from Court a portion of the sum so paid in execution of their decree for costs of the suit.

Parmanand v. Lokman Das, I. L. R., 27 All. ...

392

**Usufructuary mortgage followed by lease to mortgagor—Suit for redemption—Arrears of rent sought to be included in the mortgage debt—Diminution of security—Acquiescence of mortgagee in loss of part of the security.** The day after the execution of a usufructuary mortgage, the mortgagor entered into an agreement with the mortgagees to rent the mortgaged premises from them. The qabuliat executed in pursuance of this agreement provided that the rent, a fixed annual payment, should be charged on the property leased; but the qabuliat was neither executed nor registered on the same day as the mortgage, nor were the terms of the two instruments coincident. *Held* that the two transactions must be treated as separate, and the mortgagor could not be compelled, as a condition precedent to redemption of the mortgage, to pay off the charge created by the qabuliat. *Tajjo Bibi v. Bhagwan Prasad*, I. L. R., 16 All., 295, referred to.

At the time of the mortgage one of the mortgaged villages was the subject of a suit for pre-emption which was ultimately successful and the village passed out of the hands of mortgagees. The mortgagees, however, made no effort to obtain any equivalent from the mortgagor, but remained in possession of the rest of the mortgaged property for some years, apparently satisfied with the security. *Held* that the mortgagees were not under the circumstances entitled to claim anything from the mortgagor on redemption on account of the rents and profits of the village of which they had been so deprived. *Partab Bahadur Singh v. Gajadhar Bakhsh Singh*, I. L. R., 29 I. A., 148; S. C., I. L. R., 24 All., 521, referred to.

Khuda Bakhsh v. Alim-un-nissa, I. L. R., 27 All. ...

313

See Act No. III of 1877, section 17 ...

305

See Act No. XV of 1877, schedule II, article 1 ...

395

See Act No. IV of 1882, section 68 ...

488

section 82 ...

549

## iv

	Page.
MORTGAGE, <i>See</i> Act No. IV of 1882, sections 86 and 87...	501
..... section 90 ...	254
..... section 99 ...	450, 517
..... <i>See</i> Civil Procedure Code, section 244 ...	400
..... <i>See</i> Construction of document ...	351
..... Redemption of—, <i>See</i> Act No. IV of 1882, sections 60, 83, 95 ...	178
..... Usufructuary—, <i>See</i> Act No. IV of 1882, section 72...	403
MUHAMMADAN LAW— <i>Endowment—Waqf—Ilusory dedication—Settlement mainly for benefit of descendants of settlers—Small charge on profits of estate for religious and charitable purposes.</i> Where the substantial object of a deed was to maintain the name and dignity of the family of the executants, and to make provision for its members and their descendants in perpetuity, and it created a mere charge of inconsiderable amount on the profits of the estate for some charitable purposes, but made no dedication of the bulk of the property to any religious or charitable uses: <i>Held</i> by the Judicial Committee (affirming the decision of the High Court) that the deed did not constitute a waqf valid by Muhammadan Law.	
Muhammad Munawar Ali v. Razia Bibi, I. L. R., 27 All. ...	320
MUHAMMADAN LAW, <i>See</i> Pre-emption ...	160
MUNICIPAL BOARD, <i>See</i> Act No. XV of 1883, section 40 ...	592
OBSTRUCTION to execution, <i>See</i> Civil Procedure Code, section 331 ...	453
..... to sale, <i>See</i> Act No. XLV of 1860, section 184 ...	480
OCCUPANCY TENANT, <i>See</i> Land-holder and tenant ...	82
PARTIES— <i>Appeal—Estoppel—Procedure.</i> <i>Held</i> that when a suit has been dismissed against one of two defendants by the Court of first instance and the defeated plaintiff has not appealed against that part of the decree, the addition of the defendant against whom the suit has been dismissed to the array of parties does not empower the appellate Court to pass against him a decree which the Court of first instance declined to pass, and in the decision of which Court the plaintiff chose to acquiesce. <i>Ranjit Singh v. Shoo Prasad Ram</i> , I. L. R., 2 All., 487, and <i>Atma Ram v. Balkishan</i> , I. L. R., 5 All., 266, followed. <i>Rup Jan Bibee v. Abdul Kader Bhuyan</i> , 8 C. W. N., 496, dissented from.	
Farzand Ali Khan v. Bismillah Begum, I. L. R., 27 All. ...	23
..... <i>See</i> Act No. IX of 1872, section 230 ...	361
..... Non-joinder of—, <i>See</i> Act No. I of 1877, section 42 ...	138
..... <i>See</i> Act No. IV of 1882, sections 60, 83, 95 ...	178
..... Non-joinder of— <i>See</i> Act No. IV of 1882, section 85 ...	76
..... <i>See</i> Act No. IV of 1882, section 85 ...	511
..... section 99 ...	517
PARTITION of village, <i>See</i> Pre-emption ...	602
PENSION, <i>See</i> Construction of document ...	383
PLEADINGS— <i>Usufructuary mortgage—Purchase of equity of redemption—Suit by purchaser for redemption—Plea of right to pre-empt sale to plaintiff.</i> The plaintiffs sued as purchasers of part of the equity of redemption of a usufructuary mortgage to redeem the mortgage and recover possession of a proportionate part of the	

mortgaged property. One of the mortgagees defendants pleaded that he had a right of pre-emption in respect of the sale which formed the basis of the plaintiffs' title and was ready and willing to exercise such right.

*Held* that this plea could not be admitted as an answer to the plaintiffs' suit for redemption. *Ajudhia Bakhsh Singh v. Arb Ali Khan*, I. L. R., 7 All., p. 892, and *Ram Chand v. Durga Prasad*, I. L. R., 26 All., p. 61, referred to.

*Idarat Khan v. Hahi Bakhsh*, I. L. R., 27 All. ... 78

PLEADINGS, *See* Act No. IX of 1872, section 24 ... 266

*See* Cause of action ... 174

*See* Civil Procedure Code, section 13 ... 37

POSSESSION — *Title—Nature of merely possessory title.* A person whose title to immovable property rests upon mere possession is competent to deal with such property as if he were the owner, and his acts will be good as against all persons other than the true owner. If such a possessor executes a registered deed of gift of the property he is subject to the rule that no one can derogate from his own grant. *Govind Prasad v. Mohan Lal*, I. L. R., 24 All., 157, followed. *Phul Chand v. Lakkhu*, I. L. R., 25 All., 358, referred to.

*Pahlwan Singh v. Ram Bharose*, I. L. R., 27 All. ... 169

PRACTICE, *See* Act No. I of 1869, section 2 ... 634

*See* Criminal Procedure Code, section 439 ... 359

*See* section 439 ... 486

(Privy Council). *See* Act No. IX of 1872, section 12 ... 1

PRE-EMPTION — *Concurrent suits for pre-emption brought by co-sharers having equal rights—Form of decree.* Where, pending a suit brought by one co-sharer for pre-emption, another co-sharer having equal rights with the first filed a similar suit for pre-emption of the same sale, it was held that the second plaintiff was entitled to a decree for pre-emption in respect of one-half of the property sold. *Jai Ram v. Mahabir Rai*, I. L. R. 7 All., 720, followed. *Man Khan v. Mumur Khan*, Weekly Notes, 1886, p. 56, distinguished.

*Salig Ram v. Kali Shankar*, I. L. R., 27 All. ... 465

*Wajib-ul-arz—Construction of document.* Where a *wajib-ul-arz* gave a right of pre-emption on transfer of a share, first, to a co-sharer who was a collateral relative, then to a co-sharer in the patti, and then to a co-sharer in the mahal, "for the price offered by a stranger," it was held that no right of pre-emption accrued to a co-sharer of a superior class when the sale was to a co-sharer of an inferior class; but the right only came into existence when the sale was to a stranger. *Sheo Balak Singh v. Lachmidhar*, I. L. R., 23 All., 427, referred to. *Sukhdeo Singh v. Bahadur Singh*, Weekly Notes, 1904 p. 104, distinguished.

*Khatun Bibi v. Sayida Bibi*, I. L. R., 27 All. ... 457

*Muhammadian law—Talab-i-ishtikhad—Reference to the previous talab-i-mawasibat necessary.* When in asserting a claim for pre-emption under the Muhammadian law the making of the *talab-i-ishtikhad* is required, it is absolutely necessary that at the time of making this demand reference should be made to the fact of the *talab-i-mawasibat* having been previously made, and this necessity is not removed by the fact that the witnesses to

both demands are the same. *Abid Husain v. Bashir Ahmad*, I. L. R., 20 All., 499, and *Rajjub Ali Chopadar v. Chundi Churn Bhadra*, I. L. R., 17 Calc., 543, followed. *Chotu v. Husain Baksh*, Weekly Notes, 893, p. 101, referred to. *Sahibzadi v. Alahdiya*, Weekly Notes, 1902, p. 147, and *Nundo Pershad Thakur v. Gopal Thakur*, I. L. R., 10 Calc., 1008, dissented from.

Mubarak Husain v. Kaniz Bano, I. L. R., 27 All. ... 160

**PRE-EMPTION—Refusal to purchase—Insolvency—Civil Procedure Code, sections 351 and 352—Private sale by collector in pursuance of orders of Civil Court exercising jurisdiction in insolvency.** In order to debar a party entitled to pre-empt a sale from exercising his right an opportunity to purchase must be given when a definite agreement to purchase at a fixed price has been entered into with a stranger. It is not enough to offer property to a person entitled to pre-empt before an agreement to purchase has been entered into.

Where in pursuance of orders passed by the Civil Court in the exercise of insolvency jurisdiction certain revenue-paying property of the insolvent was sold by the Collector, but by private contract and not at public auction, it was held that such a sale did not oust the pre-emptive rights of such persons as were otherwise entitled to claim pre-emption. *Baij Nath v. Sital Singh*, I. L. R. 13 All., 224, referred to.

Kanhai Lal v. Kalka Prasad, I. L. R., 27 All. ... 670

**Re-sale of property claimed by pre-emptor—Second purchaser impleaded in pre-emptor's suit and issues determined as to his rights—*Lis pendens*—Estoppel.** After the filing of a suit for pre-emption but before service of summonses the heirs of the vendee re-sold the property claimed. The plaintiff impleaded the new vendee in his suit and amended his plaint, raising fresh issues as against the defendant so added, and the added also filed a written statement. The issues raised between the plaintiff and the added defendant were heard and ultimately decided in favour of the plaintiff. Held that the plaintiff could not, after himself causing the second vendee to be added as a party and issues to be decided as to his rights, still plead in bar of the claim put forward by that defendant, the doctrine of *lis pendens*. *Nurain Singh v. Parbat Singh*, I. L. R., 23 All., 247, distinguished.

Manpal v. Sahib Ram, I. L. R., 27 All. ... 544

**Wajib-ul-arz—Interpretation of document—Mortgage by conditional sale—Cause of action.** The pre-emptive clause of wajib-ul-arz ran as follows:—"If any co-sharer would sell his share, he must first offer it to the *biradar in haqiqi shariq haqiqat*. If they refuse, then to the other co-sharers of his patti. If none of his patti will take it, then to the owners of another patti. If all the owners of the *khalsa* will not purchase, then the owners of Chak Bazyaft shall have a right to pre-emption; and if they refuse, the owner may sell to whomsoever he likes. So too in the sale of Chak Bazyaft, precedence must be given to the *khalsawalas*. In order to decide the price, if the shah offer Rs 200 per biswa to the purchaser in case of sale or Rs. 150 in case of mortgage, the property cannot be transferred to an outsider (*wo kul badast ghair muntazil na kar-sakega*.)"

Held that in the case of a mortgage by conditional sale two causes of action arose, first, when the mortgage was made, and again when the conditional sale became absolute. *Alu Prasad v. Sukhan*, I. L. R., 3 All., 610, referred to. Held also that the stipulation as to the price to be paid by the pre-emptor was of

the nature of a covenant running with the land and was enforce-  
able even against a *bona fide* purchaser. *Korim Baksh Khan v*  
*Bhala Bibi*, I. L. R., 8 All., 102, referred to.

*Bahadur Singh v. Ram Singh*, I. L. R., 27 All. ... 12

**PRE-EMPTION**—*Wajih-ul-ara*—*Interpretation of document*.] A claim for pre-emption was put forward on the basis of a *wajih-ul-ara*, the material clause of which ran as follows:—"Up to now there has been no suit for pre-emption, but we accept the right of pre-emption." The previous *wajih-ul-ara* of the village, of date some 22 years earlier, contained this provision as to the right of pre-emption:—"If a co-sharer is desirous of transferring his share, he shall transfer it, first, to his near relative, and next to co-sharers in the village, and on their refusal he may mortgage or sell it to anyone he likes." Held on a construction of these two documents that they amounted to a record of a custom of pre-emption as prevailing in the village; also that a near relative need not also be a co-sharer; the two were distinct classes of pre-emptors, the near relative having the prior claim. *Abdul Wahid v. Wilayat Hussain*, Weekly Notes, 1902, p. 109, referred to.

*Ram Din v. Pokhar Singh*, I. L. R., 27 All. ... 553

*Wajih-ul-ara*—*Construction of document*—*Partition of village into separate mahals*—*Provisions of existing wajih-ul-ara as to pre-emption copied verbatim into wajih-ul-ara of new mahals*.] Where on partition of a village into two separate mahals the provisions of a former *wajih-ul-ara*, which recorded a custom of pre-emption as existing in favour of, amongst others, "co-sharers in the village," were copied verbatim into the *wajih-ul-ara* of each of the new mahals, it was held that the effect of this was to leave to the co-sharers in each of the new mahals rights of pre-emption *inter se*. A "village" (*gaon* *manas* or *doh*) is not the same thing as a "mahal" and must not be confounded therewith; nor does the breaking up of a village into separate mahals of necessity destroy all the existing rights as to pre-emption of the co-sharers in the village. *Gokal Singh v. Munna Lal*, I. L. R., 7 All., 772, *Mata Din v. Mahesh Prasad*, Weekly Notes 1892, p. 100, *Ghose v. Man Singh*, I. L. R., 17 All., 220, and *Dalgonjan Singh v. Kulko Singh*, I. L. R., 22 All., 1, referred to.

*Auseri Lal v. Ram Bhajan Lal*, I. L. R., 27 All. ... 602

See Act No. XLV of 1860, sections 417, 420 ... 302

See Act No. VII of 1870, section 17 ... 186

See Act No. XV of 1877, section 18, schedule II,  
articles 10 and 120 ... 540

See Pleadings ... 78

**PRELIMINARY POINT**, See Civil Procedure Code, section 502 ... 691

**PRESUMPTION**, See Hindu Law ... 203

**PRINCIPAL AND AGENT**, See Civil Procedure Code, section 215A ... 374

**PRIOR AND SUBSEQUENT INCUMBRANCES**, See Act No. IV of  
1882, section 72 ... 403

Code, section 244 ... See Civil Procedure ... 400

Code section 278 ... See Civil Procedure ... 700

See Mortgage ... 97

See Mortgage ... 308



	Page.
PRIVY COUNCIL. Practice of—, <i>See</i> Act No. I of 1869, section 2	634
PROCEDURE, <i>See</i> Act No. VII of 1889, section 7(3)	452
— <i>See</i> Act (Local) No. II of 1901, section 202	167
— <i>See</i> Civil Procedure Code, section 331	453
— <i>See</i> Parties	23
PROPERTY regarding which an offence has been committed, <i>See</i> Criminal Procedure Code, sections 517, 520	630
PUBLIC POLICY, <i>See</i> Vendor and purchaser	271
PUBLIC SERVANT. Lawful authority of—, <i>See</i> Act No. XLV of 1860, section 434	300
— Personation of—, <i>See</i> Act No. XLV of 1860, section 170	294
— Resistance to lawful authority of— <i>See</i> Act No. XLV of 1860, section 186	469
QABULIAT, <i>See</i> Act No. IV of 1882, section 107	136
REDEMPTION OF MORTGAGE, <i>See</i> Act No. IV of 1882, sections 60, 83, 95	178
— <i>See</i> Act No. IV of 1882, section 91(b)	472
— <i>See</i> Mortgage	392
REGISTRATION, <i>See</i> Act No. III of 1877, section 17	305
RELINQUISHMENT OF HOLDING, <i>See</i> Land-holder and tenant	82
REMAND, <i>See</i> Civil Procedure Code, section 562	691
RENT, <i>See</i> Act (Local) No. III of 1901, sections 56 and 86	183
RENT AND PROFITS Liability to account for—, <i>See</i> Construction of document	351
RES JUDICATA, <i>See</i> Civil Procedure Code, section 13	87
— explanation II	142
—	148
—	163

REVIEW—*Powers of review of High Court in Criminal cases—Finality of order of High Court—Order not sealed—Criminal Procedure Code, sections 107 and 110—Security for keeping the peace—Security for good behaviour.* An application from jail—worded as an appeal—against an order passed under sections 110 and 118 of the Code of Criminal Procedure was summarily rejected by means of the following order:—"No appeal lies in this case, and no sufficient ground appears for interference in revision. The application is dismissed." This order was signed by the Judge who passed it, but was not sealed with the seal of the Court.

*Held* that the Judge who had passed the order quoted above was not under the circumstances precluded from entertaining an application for revision presented by counsel in relation to the same matter. *Queen-Empress v. Lalit Tiwari*, I. L. R., 21 All., 177, followed.

*Held* also that where it appears from the evidence that there is an apprehension of any one using violence towards a particular person or particular persons he ought to be bound over to

	Page.
keep the peace as provided by section 107, and not be proceeded against under section 110 of the Code of Criminal Procedure.	
Emperor v. Kallu, I. L. R., 27 All. ....	92
REVIEW OF JUDGMENT, <i>See</i> Civil Procedure Code, section 622 ....	696
REVISION, <i>See</i> Act No. V of 1861, section 4(2) ....	292
..... <i>See</i> Act No. IX of 1887, section 25 ....	192
..... section 25 ....	531
..... <i>See</i> Civil Procedure Code, sections 2 and 244 ....	380
..... <i>See</i> Criminal Procedure Code, section 145(1) ..	296
..... <i>See</i> Criminal Procedure Code, section 439 ....	359
.....	489
..... and 523 ....	397
RULES OF COURT OF THE 4TH APRIL 1894, RULE 12, <i>See</i> Act No. VII of 1870, section 28 ....	411
SALE by order of Court exercising insolvency jurisdiction, <i>See</i> Prescription ....	670
SANCTION TO PROSECUTE, <i>See</i> Act No. V of 1861, section 4(2) ....	296
SECURITY FOR GOOD BEHAVIOUR, <i>See</i> Criminal Procedure Code, sections 110, 112, 190, 191, and 526 ....	172
..... <i>See</i> Criminal Procedure Code, section 110 ....	262
..... <i>See</i> Criminal Procedure Code, sections 110 and 118 ....	293
KEEPING THE PEACE <i>See</i> Criminal Procedure Code, sections 107, 118 and 406 ..	623
SET-OFF, <i>See</i> Civil Procedure Code, sections 111 and 216 ....	146
SMALL CAUSE COURT SUIT, <i>See</i> Act No. IX of 1887, section 25 ....	531
..... schedule II, article 28 ....	622
..... <i>See</i> Civil Procedure Code, section 586 ....	200
SPECIFIC PERFORMANCE, <i>Suit for—Lease—Covenant for renewal—Construction of document—Time, whether or not of the essence of the contract.</i> The plaintiff sued for specific performance of a covenant for renewal contained in a lease, the material clause of which was as follows:—"After the expiration of the said term, if the lessee shall so desire, the executant shall have no objection whatever to renew the lease for a further term of twenty years on the terms and in consideration of payment of the rent mentioned in the lease." There was nothing in the lease to indicate that notice of intention to renew was to be given before its expiration.	
<i>Held</i> on a construction of the lease that time was not of the essence of the contract, and that the plaintiff had not forfeited his right to have the lease renewed by reason of having allowed some months to elapse after the expiration of the original term before he gave notice to the defendants of his intention to take advantage of the covenant for renewal.	
Jaggi Lal v. Sir W. E. Cooper, I. L. R., 27 All. ....	696
SPECIFIC PERFORMANCE, <i>See</i> Act No. I of 1877, section 22 ....	678
STAMP, <i>See</i> Act No. II of 1899, schedule I, article 1 ....	84
SUB-MORTGAGE, <i>See</i> Act No. IV of 1882, section 85 ....	511
..... section 91(b) ....	472

# GENERAL INDEX.

lxi

	Page.
SUCCESSION, <i>See</i> Act No. I of 1869, section 2...	534
<i>See</i> Hindu law ...	581
SUIT by co-sharer against lambardar for profits, <i>See</i> Adverse possession ...	436
... ..	374
— for an account, <i>See</i> Civil Procedure Code, section 215A ...	
— for cancellation of document— <i>Will—Suit for cancellation of will brought during the life-time of the testator.</i> Held that no suit for the cancellation of a will can lie in the life-time of the testator Rambhajan Kunwar v. Gureharan Kunwar, I. L. R., 27 All.	14
— for recovery of joint possession, <i>See</i> Joint property ...	153
— for redemption of mortgage, <i>See</i> Act No. VII of 1870, section 7, IX; schedule I ...	447
— for redemption of mortgage, <i>See</i> Pleadings ...	78
— for restitution of conjugal rights, <i>See</i> Hindu law ...	96
— to establish right to property sold in execution, <i>See</i> Civil Procedure Code, sections 278 and 283 ...	464
— to recover from auction purchaser property of absconding offender illegally sold, <i>See</i> Criminal Procedure Code, sections 87, 88 and 89 ...	572
— to recover movable property by right of inheritance, <i>See</i> Act No. IX of 1887, schedule II, article 28 ...	622
— to recover profits of sir land in an undivided mahal, <i>See</i> Limitation ...	348
— to set aside mortgages on the ground of insanity, <i>See</i> Act No. IX of 1872, section 12 ...	1
TENANTS IN COMMON, <i>See</i> Construction of document ...	310
TITLE, <i>See</i> Possession ...	169
TORT, <i>See</i> Act No. IX of 1887, section 25 ...	531
TRANSFER, <i>See</i> Criminal Procedure Code, sections 110, 112, 190, 191, and 526 ...	172
TRUST— <i>Suit for possession of trust property as manager—Limitation—Act No. XI of 1877 (Indian Limitation Act), schedule II, articles 124 and 144.</i> Where the plaintiff claimed possession of certain trust property as manager by right of inheritance from the founders of the trust, there being no allegation of misappropriation of the trust property it was held that the limitation applicable to such suit was that prescribed by article 124 or article 144 of the second schedule to the Indian Limitation Act, 1877, and began to run from the time when the possession of the defendant became adverse to the plaintiff, <i>Balwant Rao v. Puran Mal</i> , I. L. R., 6 All., 1; S. C. L. R., 10 I. A., 90, referred to.	
Jadunath Prasad v. Girdhar Das, I. L. R., 27 All. ...	518
— <i>See</i> Construction of document ...	283
VALUATION OF SUIT, <i>See</i> Act No. VII of 1870, section 28 ...	411
<i>See</i> Civil Procedure Code, section 283 ...	440
VENDOR AND PURCHASER— <i>Suit by person out of possession but entitled to possession—Hindu Law—Chamerty and maintenance—Deed of sale of share in taluq in consideration of funds for suit to recover it—Public policy—Evidence of adoption.</i> In order to provide funds to prosecute his claim to the Birwa Mehnou taluq a deed of sale, in favour of the respondent, of a moiety of the taluq was in 1888 executed whilst out of possession by a person who (if the	

adoption as successor to the Mankapur Raj of the head of a senior branch of the family in 1684 were proved) was entitled to succeed to the taluq as being the son of the collateral who was the nearest heir when the succession opened out in 1879 on the death of the daughter of the original taluqdar, whose husband, the appellant, then obtained possession. The taluq was one in lists 1 and 2 under Act I of 1869 and devolved on a single heir, though not descending by the rules of lineal primogeniture. The respondent as complainant with his vendor brought a suit against the appellant to recover possession of the taluq. The vendor entered into a compromise and withdrew from the suit, which was prosecuted by the respondent alone. The validity of the deed of sale was impeached by the appellant on the ground that it was champertous and contrary to public policy, it being contended that the suit was therefore not maintainable. *Held* by the Judicial Committee (affirming the decision of the Court of the Judicial Commissioners of Oudh) that the transaction was a present transfer by the vendor of a moiety of his interest in the taluq giving a good title to the respondent, on which it was competent to him to sue. The vendor could not have prosecuted his claim to the estate without assistance; there was nothing extortionate or unreasonable in the terms of the bargain, no gambling in litigation, and nothing contrary to public policy.

*Held* also, with regard to the adoption, that notwithstanding it took place so long ago that it was impossible to prove that all requisite ceremonies were duly and regularly performed, and although no change of gotra occurred, evidence in favour of the adoption preponderated; a body of strong and persistent tradition preserved in the *wajih-nam* of the Mankapur Raj and recorded in the Oudh Gazetteer and Gonda Settlement Report was in favour of it; it had been supported by the appellant in former litigation, and no claim to the Bawa Mehnou taluq had ever been set up by any member of the Mankapur family with which the adoption had been made. The decision of the Judicial Commissioner's Court upholding the adoption was therefore affirmed.

Achal Ram v. Kazim Hussain Khan, I. L. R., 27 All. ... 271

WAJIB-UL-ARZ, <i>See</i> Land-holder and tenant	...	338, 356
<i>See</i> Pre-emption	...	12, 457, 602, 553
WAKF, <i>See</i> Muhammadan Law	...	320
WARRANT, <i>See</i> Act No. XLV of 1860, section 183	...	258
<i>Legality of—See</i> Act No. XLV of 1860, sections 225B and	...	
353	...	491
WILL, <i>See</i> Suit for cancellation of document	...	14

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PRIVY COUNCIL.

P. C.  
1904  
July 8, 12,  
29.

DURGA BAKHSH SINGH (PLAINTIFF) v. MUHAMMAD ALI BEG  
(DEFENDANT).

[On appeal from the Court of the Judicial Commissioner of Oudh,  
Lucknow.]

*Unsoundness of mind—Act No. IX of 1872 (Indian Contract Act), section 12—  
Suit to set aside mortgages on ground of insanity of mortgagor at the time  
of execution—Decision on case not made by the evidence—Different types  
of insanity—Concurrent decisions on facts.*

In suits to set aside mortgages on the ground that the mortgagor was of  
unsound mind at the time of their execution, the plaintiff's witnesses gave  
evidence which showed insanity of a violent type, but their evidence was not  
believed by either of the Courts below. *Held* that it was not allowable for  
the Court of first instance to substitute for the case of insanity advanced by  
the plaintiff a case of weakness of mind and consequent helplessness, when  
the type of insanity connoted in the evidence was something quite different,  
and on that ground to give the plaintiff partial relief.

There being concurrent decisions that there was no insanity of the type  
set up by the plaintiff, and it not being shown that there was any want of  
consideration for the mortgages, the decision of the Court of the Judicial  
Commissioner of Oudh dismissing the suits was upheld.

Two appeals consolidated from judgments and decrees (31st  
July 1899) of the Court of the Judicial Commissioner of Oudh,  
by which judgments and decrees (27th October 1898) of the  
Subordinate Judge of Sitapur were varied, and the appellant's  
suits dismissed with costs.

The suits were instituted for the cancellation of two deeds  
of mortgage executed on 13th January 1892 by Fateh Singh,  
the father of the appellant, in favour of Mirza Muhammad Ali  
Beg, the respondent. The cancellation was sought on the  
ground that Fateh Singh, at the time of executing the mortgages,  
was insane, or at any rate, of weak intellect, and that undue  
advantage had been taken of him.

*Present*:—Lord DAVEY, Lord ROBERTSON, and Sir ARTHUR WILSON.



1904

DURGA  
BAKSH  
SINGH  
v.  
MUHAMMAD  
ALI BEG.

Both the Courts below found that he was not insane.

The facts of the cases are sufficiently stated in the judgment of the Judicial Commissioners (Messrs. SPANKIE and BLENNERHASSETT) appealed from, which, so far as material was as follows:—

“Fateh Singh was the owner of three villages, named Karkhala, Lauhangpur, and Muraili. On 30th July 1880, he mortgaged the three villages to Mirza Muhammad Ali Beg for Rs. 26,000. The mortgagee subsequently sued for possession of the mortgaged property, obtained a decree for possession of the same, and on 10th December 1882 obtained possession of the villages in execution of the decree. On 12th November 1883, Fateh Singh sold mauza Karkhala to Thakur Jawahir Singh for Rs. 26,500, and on the same date mortgaged the other villages to the same person for Rs. 15,663. On 1st July 1884, Fateh Singh again mortgaged the villages to Muhammad Ali Beg for Rs. 18,000. On 7th June 1888, Jawahir Singh paid into Court a certain sum of money for payment to Muhammad Ali Beg in satisfaction of his prior mortgage dated 30th July 1880. On 23rd July 1888, Muhammad Ali Beg received the money. On 12th February 1889, Muhammad Ali Beg brought a suit against Fateh Singh and Jawahir Singh for Rs. 14,703-5-0 on his mortgage dated 1st July 1884. On 13th May 1889, he obtained a decree against Fateh Singh for Rs. 12,235-9-0. Fateh Singh appealed against this decree to the Judicial Commissioner. Fateh Singh had contended in the Court of first instance that he was entitled to an account from Muhammad Ali Beg of the profits of the three villages during the time the latter was in possession of them under the decree dated 18th October 1882 obtained by him on his mortgage dated 30th July 1880. The Court of first instance disallowed this contention. The Judicial Commissioner allowed the contention. He was of opinion that Muhammad Ali Beg was only entitled to the sum of Rs. 1,716 out of the annual profits, and that he must account for the profits of the villages during the time that he was in possession. He accordingly set aside the decree and remanded the suit under section 562 of the Code of Civil Procedure for re-trial. His judgment is dated 26th May 1890. The

suit accordingly went back to the District Judge of Sitapur. A Pleader, Babu Bimla Prasad, was appointed a Commissioner to take the account. On 13th January 1892 while the suit was still pending, Fateh Singh executed a mortgage of Lauhangpur and Muraili to Muhammad Ali Beg for Rs. 14,400, and on the same date he executed in his favour a mortgage for Rs. 8,000. On 26th January 1892, Muhammad Ali Beg withdrew the suit. In April 1892, Fateh Singh's wife applied to have her husband adjudged a lunatic and incapable of managing his affairs, and on 23rd May 1892, Fateh Singh was adjudged a lunatic and incapable of managing his affairs. On the 15th December 1892, Fateh Singh's wife instituted a suit to set aside the mortgages in favour of Mirza Muhammad Ali Beg for Rs. 14,400 and Rs. 8,000. Fateh Singh died on the 23rd February 1893. For some years before his death he had been blind. After certain proceedings had taken place in the suit, the suit was converted into two separate suits, one to set aside the deed for Rs. 14,400 and the other to set aside the deed for Rs. 8,000, and Durga Baksh *alias* Munnu Singh, son of Fateh Singh, became the plaintiff in the two suits.

1904  
DURGA  
BAKSH  
SINGH  
v.  
MUHAMMAD  
ALI BEG.

"The allegations made by the plaintiff in both his complaints were that the defendant, Mirza Muhammad Ali Beg, was convinced that the suit which he had brought against Fateh Singh on his mortgage dated the 1st July 1884, would be dismissed and that a large sum of mesne profits of the villages would be decreed against him; that in order to avoid this state of things, he colluded with the servants of Fateh Singh, and through them he fraudulently brought to bear undue influence on Fateh Singh, who was an old man of weak intellect and had become insane; that on the 13th January 1892, he made him execute a deed for Rs. 14,400, showing as consideration the amount improperly claimed in his suit; that in order to defray the expenses of his fraud, he made Fateh Singh execute the deed for Rs. 8,000; and that, having done these things he caused his suit to be dismissed. The suits were tried together. The first and second issues were as follows:—

"(1) 'Whether both the deeds were executed by fraud and undue influence during the insanity of Fateh Singh, and

1904

DURGA  
BAKHSH  
SINGH  
v.MUHAMMAD  
ALI BEG.

therefore are not binding?' or (2) 'Whether these documents were executed *bona fide* for legal consideration in Fateh Singh's proper state of mind, and are therefore valid?'

"The Subordinate Judge of Sitapur, who tried the suits, was of opinion that Fateh Singh was not insane, but that he was 'quite helpless, weak-minded and not independent.' He went on to say that Tnukur Jawahir Singh and the defendant 'surrounded him, and when any of them got him into his trap made him execute a document with regard to his villages in his favour, and brought a suit against his rival. Whatever agreements and contracts were made by these two Taluqdars were made in the helpless condition of the executant.' The Subordinate Judge found that the deed for Rs. 8,000 was a good deed. As to the deed for Rs. 14,400, he found that it was valid to the extent of Rs. 8,000 only, and not good as to the remainder of the money. He passed decrees accordingly and directed that each party should pay their own costs in each suit.

"The plaintiff and the defendant have both appealed from the decree in the suit on the deed for Rs. 14,400, and they have also both appealed from the decree in the suit on the deed for Rs. 8,000. It was contended on behalf of the plaintiff that the evidence produced by him established that at the time of the execution of the deeds, Fateh Singh was not of sound mind, within the meaning of section 12, Indian Contract Act, 1872, that is to say that at the time when he executed the deeds he was not capable of understanding them and of forming a rational judgment as to their effect upon his interests.

"According to the evidence produced by the plaintiff, Fateh Singh was suffering from 'mania' with lucid intervals, and became insane suddenly about 15 months or so before he died. For instance, according to Anseri Lal, the first witness for the plaintiff, Fateh Singh was in good health and in sound intellect, when he went to Lucknow in October or November 1891, and on his return became insane. When the witness went to see him he was raving. He used to go about naked and used filthy language. He caused his crops to be destroyed and would not allow them to be reaped. According to Lalta Singh, the second witness for the plaintiff, he was told that Fateh Singh used to

1904

DURGA  
BAKHSI  
SINGHv.  
MUHAMMAD  
ALI BEG.

tear off his clothes and use filthy language. According to Mata Din, the third witness for the plaintiff, Fateh Singh used to throw filth about and when any one went near him he felt for him and would strike him with a *lathi*. The evidence of the other witnesses is generally to the same effect. The Subordinate Judge clearly did not believe the evidence produced to prove that Fateh Singh was insane in the sense deposed to by the witnesses, and I am of opinion that he was quite right in not believing them. It is improbable that Fateh Singh would suddenly fall into the mental condition described by the plaintiff's witnesses. The evidence as to Fateh Singh's bodily condition for a year or so before his death is very discrepant. Some of the witnesses say that he suffered from fever and diarrhoea during the whole of that period, and some that he suffered from those diseases for 15 or 20 days before his death. The Subordinate Judge does not state from what facts he draws the inference that Fateh Singh was weak-minded. Nor does he say what he means by Fateh Singh's being weak-minded. If the evidence produced by the plaintiff showing that Fateh Singh was insane is incredible, there seems to me to be no evidence at all which can be taken to prove that Fateh Singh was otherwise of unsound mind. The defendant called the Sub-Registrar who registered the deeds, and he also called Babu Bimla Prasad the Commissioner appointed in the suit brought by the defendant against Fateh Singh. According to their evidence, Fateh Singh was in full possession of his senses at the time the deeds were executed. It seems to me that the plaintiff has quite failed to prove that at the time Fateh Singh executed the mortgages he was insane. I also think that the plaintiff has not proved that at the time that Fateh Singh executed the mortgages his mental capacity was affected by reason of age, illness, or mental or bodily distress. It was further contended for the plaintiff that the relations subsisting between the defendant and Fateh Singh as creditor and debtor were such that the defendant was in a position to dominate the will of Fateh Singh and used that position to obtain an unfair advantage over Fateh Singh. It was admitted that the contract of mortgage evidenced by the deed for Rs. 14,400, was not on



1904

DURGA  
BAKSHI  
SINGH  
v.  
MUHAMMAD  
ALI BEG.

the face of it unconscionable, and that the evidence adduced did not prove it to be unconscionable. But it was contended that the Court ought to remand the case in order that the account might be taken, which was directed to be taken by the Judicial Commissioner in the suit brought by the defendant against Fateh Singh. It was asserted that if such an account were taken it would be found that, instead of anything being due to the defendant on the mortgage on which he brought the suit, that is, the mortgage dated the 1st July 1884, a large sum was due to Fateh Singh from the defendant, in respect of the profits of the three villages of which he obtained possession under the decree, dated the 18th October 1882, and that this fact would establish that the defendant had used his position to obtain an unfair advantage over Fateh Singh.

"The deed for Rs. 14,400 recites that Rs. 14,400 were due from Fateh Singh to the defendant 'on account of all the decrees passed by the Subordinate Judge of Sitapur, and on account of the suit to enforce the mortgage pending in the Court of the District Judge in which a Commissioner to examine the accounts has been appointed, and also on account of the suits, which are pending in the Courts of the Munsifs by the Collector of Sitapur.' The deed does not specify what was due to the defendant on the mortgage dated the 1st July 1884. Before the Subordinate Judge it was said on behalf of the defendant that about Rs. 8,000 of the principal sum was due on that mortgage and the rest of the Rs. 14,400 was due on the decrees mentioned in the deed. It is difficult to understand the Subordinate Judge's judgment, but he appears to have thought that the principal sum secured by the deed for Rs. 14,400 represented the claim of the defendant on his mortgage dated the 1st July 1884, and that the mention of the decrees in the deed was merely colourable. He decided that only Rs. 8,000 could be properly due to the defendant on the mortgage dated the 1st July 1884, and he, therefore, held that the deed was valid to that extent only. The question is whether the plaintiff is entitled to a remand to have it ascertained, by an account being taken, what was due to the defendant when the deeds of mortgage in dispute were executed,



1904

DURGA  
BAKHSH  
SINGH  
v.  
MUHAMMAD  
ALI BEG.

On his mortgage dated 1st July 1884, regard being had to the order of the Judicial Commissioner in the suit brought by the defendant against Fateh Singh, it was contended that the plaintiff was misled, by the form of the issues (1) and (2), into thinking that it did not lie on him to show that the defendant, in obtaining the mortgage for Rs. 14,400, had obtained an unfair advantage over Fateh Singh. It appears to me that there is nothing in the form of the issues which was calculated to deceive the plaintiff. His legal advisers must have known that it was most important for the plaintiff to prove that the mortgage was unfairly advantageous to the defendant, and that they would be able to prove this, if they proved, from the defendant's accounts, or in some other way, that, instead of any money being due to him on his mortgage dated 1st July 1884, he was indebted to Fateh Singh for surplus profits received by him for the three villages during the time he was in possession of them. The plaintiff is not, in my opinion, entitled to any further opportunity of proving that the mortgage for Rs. 14,400 was unreasonable or unfairly advantageous to the defendant. It appears that the Subordinate Judge was wrong in decreeing the plaintiff's suit as regards the balance of Rs. 14,400, namely Rs. 6,400. The defendant has produced the following decrees obtained by him against Fateh Singh, namely, three decrees, dated 3rd June 1889, obtained by him in the Court of the Subordinate Judge of Sitapur, aggregating in amount including costs, Rs. 6,218-2-0, and three decrees, dated August 1891, obtained by him in the Court of the Deputy Collector of Sitapur, aggregating in amount, including costs, Rs. 411-10-3. There is no evidence that at the time when the mortgage for Rs. 14,400 was executed these decrees had been satisfied. For these reasons, I am of opinion, that the plaintiff's case as regards the mortgage for Rs. 14,400 fails and that his appeal must be dismissed with costs, and that the cross appeal by the defendant must be decreed with costs.

"I would therefore modify the decree of the Subordinate Judge in the suit brought to set aside that mortgage and dismiss the plaintiff's suit with costs in the Court of first instance.

1904

DURGA  
BAKSH  
SINGH  
v.  
MUHAMMAD  
ALI BEG.

"As to the suit in respect of the deed for Rs. 8,000 I have found that it was not proved that Fateh Singh was insane, or that his mental capacity was affected by reason of age, illness, or mental or bodily distress, when he executed the mortgages. It is not denied that the consideration for the mortgage for Rs. 8,000 was paid to Fateh Singh in cash. Under these circumstances the plaintiff's claim as regards this mortgage must also fail. His appeal, therefore, in the suit on this mortgage should be dismissed with costs."

On this appeal.

Mr. *DeGruyther*, for the appellant, contended that the evidence satisfactorily showed that Fateh Singh was of unsound mind at the time he executed the mortgages. The mental aberrations and unaccountable acts spoken to by the witnesses, coupled with his undoubted infirmities, old age, blindness, weakness of intellect and violence of temper showed the mind was sufficiently unsound to bring him within the provisions of the Contract Act (IX of 1872) as being incapable of understanding the contracts he was making. This was the judgment of the Subordinate Judge who, who, not insane, held that he was "quite helpless, was not independent." In such a state he was liable to be influenced by the respondent, who took advantage to obtain execution of the mortgages. The evidence, moreover, showed fraud on the part of the respondent, upon whom under the circumstances of the case, the *onus* lay to show the *bona fides* of the transactions, and to prove that the appellant received consideration for the mortgages, particularly in the case of that for the larger amount. This *onus* the respondent had not discharged.

Mr. *W. C. Bonnerjee*, for the respondent, contended that there being concurrent decisions of the two Courts below that Fateh Singh was not insane at the time of the execution of the mortgages, and those Courts having also concurrently found with regard to the mortgage for Rs. 8,000 that the appellant was entitled to no relief, the only question on the appeal was as to the mortgage for Rs. 14,400. With respect to that mortgage the decrees of Court in satisfaction of which the mortgage

bond was obtained were put in evidence and were on the record: there was, therefore, no ground for saying that the consideration for it had not been proved. In this view the decision of the Judicial Commissioners that the appellant was not entitled to any relief as to either mortgage bond was correct; and the appeal should therefore be dismissed.

Mr. DeGruyther replied.

1904, July 29th.—The judgment of their Lordships was delivered by LORD ROBERTSON:—

The questions raised by these appeals arose in two suits, now consolidated, brought for the cancellation of two mortgage deeds granted to the respondent by Fateh Singh, the appellant's father, on 13th January 1892. The ground of each case, viz., that Fateh Singh was insane, was proved to have been obtained by fraud. At the same time we must bear in mind that the consideration of the respondent, inasmuch as the one for Rs. 8,000, was a fresh advance of cash paid down, while the other for Rs. 14,400 was granted as the result of a long series of mortgages and decrees.

The Subordinate Judge, on 27th October 1898, held that the mortgage could not be cancelled. As regards the respondent's claim he held it good to the extent of Rs. 8,000, and bad as regards the balance of Rs. 6,400. The Judicial Commissioner of Oudh, on 31st July 1899, held that the appellant had failed to establish his case in either suit and dismissed both.

The essential weakness of the appellant's position is that both Courts have held Fateh Singh not to have been insane, and the grounds upon which the Subordinate Judge gave him a limited decree in the Rs. 14,400 suit are entirely unsupported by evidence. The theory of the Subordinate Judge was that, while Fateh Singh was not insane, he was helpless and weak-minded, and the respondent defrauded him. Neither of these propositions is substantiated. All the testimony which goes to mental unsoundness in Fateh Singh goes to insanity in its crudest and most palpable form, and there is no case of helplessness or weakness. Fateh Singh was blind, and had been so for fifteen years. But the picture drawn of him by the appellant's

1904

DURGA  
BAKSH  
SINGH  
v.  
MUHAMMAD  
ALI BEG.

1904

DURGA  
BAHSH  
SINGH

v.

MUHAMMAD  
ALI BEG.

witnesses is not of a helpless old man, but of a raving old man. Several witnesses so describe him, and, having done so, leave their assertion unsupported by detail or circumstance. This account of Fatch Singh found no credence in either Court, and had been contradicted by adequate and responsible testimony.

Now the case constructed by the Subordinate Judge and substituted for that advanced by the appellant is the case of a helpless or facile mortgagor, operated on by a fraudulent mortgagee. But then it is not legitimate to commute an insufficient case of insanity into a complete case of weakness, when the type of insanity connoted in the evidence is something quite different; and, second, the appellant has entirely failed to make out any case of fraud at all. As regards the mortgage for Rs. 8,000, the materials were discouraged, this being a fresh advance of cash; and the more money, or some part of it, was paid by Fatch connected with the respondent comes to nothing, been followed up by showing these payments to have been made *sine causa*. As regards the mortgage for P the antecedent obligations of Fatch Singh under old and decrees make it at least probable that he was really, or some similar sum, the amount of which had been under negotiation. But it was for the appellant to bring this to a point by proving the state of the account; and on the face of the record this was one of the conditions of his succeeding. It is impossible to supplant this sort of case by a conjectural theory about the machinations of two Taluqdars, such as has been supplied by the Subordinate Judge.

Their Lordships will humbly advise His Majesty that the appeals ought to be dismissed. The appellant will pay the costs of the appeals.

*Appeals dismissed.*

Solicitors for the appellant: Messrs. T. L. Wilson & Co.

Solicitors for the respondent: Messrs. Burrow, Rogers and Nevill.

J. V. W.





## REVISIONAL CRIMINAL.

1904  
May 18.*Before Mr. Justice Blair.*

BUDHNI v. DABAL.\*

*Criminal Procedure Code, sections 488 and 489—Maintenance of child—Power to cancel an order for maintenance.*

*Held* that where an order has once been passed by a competent Court under section 488 for the payment of maintenance for a child, the only power that exists of modifying such an order is that given by section 489 of the Code.

The facts of the case are as follows:—

Musammatt Jr. wife of a Muhammadan Teli called Dabal, applied for maintenance under section 488 of the Code against her husband. Pending the application, Dabal married his wife; but as she was with child, he continued the payment of Rs. 2 a month to her until the birth of the child. On the birth of the child, named Budhni, an application for maintenance was made on her behalf by her mother. Dabal was not his, but this was found against her. An order for maintenance was made. Subsequently Budhni married again, and thereupon Dabal applied to the Magistrate to cancel the order against him upon the ground that Jamni's second husband Shabrati had undertaken to maintain the child. The Magistrate to whom this application was made summoned both Jamni and Shabrati, and after holding an inquiry set aside the order for maintenance. An application for revision of this order was presented by Jamni to the Sessions Judge, who reported the case to the High Court under the provisions of section 438 of the Code of Criminal Procedure, being of opinion that the Magistrate was not competent under the circumstances of the case to set aside the order for maintenance.

The Assistant Government Advocate, (Mr. W. K. Porter), in support of the reference.

BLAIR, J.—This is a reference by the Sessions Judge, who is of opinion that the order of a Magistrate cancelling a previous order made by another Magistrate for the maintenance

\* Criminal Reference No. 263 of 1904.



1904

BUDHNI  
v.  
DABAL.

of a child of a divorced Muhammadan wife who has married again is invalid in point of law. It seems to me that the Judge is right. I can see in the Code of Criminal Procedure no power to deal with or modify such an order except under the circumstances set forth in section 489. I do not see any change in the circumstances of the infant, upon which alone any alteration in such allowance can be made. I therefore agree with the Sessions Judge and set aside the order of cancellation passed by the Magistrate, Pandit Jagannath Prasad. The effect will be to revive the order of Maulvi Abdul Majid Khan, Magistrate, dated the 27th of November 1902. Return the papers.

1904<sup>\*</sup>  
May 19.

## APPELLATE COURT

Before Mr. Justice Knox and Mr. J.

BAHADUR SINGH (DEFENDANT) v. RAM SI.

Pre-emption—Wajib-ul-arz—Interpretation of document  
conditional sale—Cause of action.

The pre-emptive clause of wajib-ul-arz ran as follows:—  
"If the sharer would sell his share, he must first offer it to the *biroday-shariq haqiqat*. If they refuse, then to the other co-sharers. If none of his patti will take it, then to the owners of another *khalsa*. If all the owners of the *khalsa* will not purchase, then the owners of *Bazyaft* shall have a right to pre-emption; and if they refuse, the owner may sell to whomsoever he likes. So too in the sale of *Chak Bazyaft*, precedence must be given to the *khalsawalas*. In order to decide the price, if the sharer shall offer Rs. 200 per *biawa* to the purchaser in case of sale or Rs. 150 in case of mortgage, the property cannot be transferred to an outsider (*wo kul badast ghair muntaqil na kar-sakega*.)"

Held that in the case of a mortgage by conditional sale two causes of action arose, first, when the mortgage was made, and again when the conditional sale became absolute. *Alu Prasad v. Sukhan* (1) referred to. Held also that the stipulation as to the price to be paid by the pre-emptor was of the nature of a covenant running with the land and was enforceable even against a *bond fide* purchaser. *Karim Bakhsh Khan v. Phula Bibi* (2) referred to.

This was a suit for pre-emption. On the 28th of March 1874, Girdhari Singh and others mortgaged by way of conditional sale to Bahadur Singh two and-a-half *biawas* of patti

\* Second Appeal No. 750 of 1902, from a decree of C. D. S. esq., District Judge of Shahjahanpur, dated the 13th of August 1902, confirming a decree of Babu Shiva Prasad, Munsif of Shahjahanpur, dated the 12th of February 1902.

(1) (1881) I. L. R., 3 All., 610.

(2) (1886) I. L. R., 8 All., 102.

1904

BAHADUR  
SINGH  
v.  
RAM SINGH.

Man Singh in Lachmanpur, and also one-fourth of chak Bazyaft in the same village. The amount advanced was Rs. 4,000 and the period was twenty-five years. On the 30th of March 1900, Bahadur Singh got a decree for foreclosure against the representative of the mortgagor, and this was made absolute on the 3rd of October 1900. On the 2nd of October 1901, the plaintiff Ram Singh, who was a co-sharer in patti Bhure Singh of mauza Lachmanpur and also in chak Bazyaft, instituted the present suit for pre-emption of the property the subject of Bahadur Singh.

The suit was based on the village which as to pre-emption were as follows:—If I sell his share, he must offer it at *iq haqiyat*. If they refuse, I will take it as patti. If none of his patti takes it, I will take it as patti. If all the patti refuse, then the owners of Chak Bazyaft have the right of pre-emption; and if they refuse, I will take it as patti. So too in the sale of the property, precedence must be given to the *khalsawalas*. If the price, if the shafi offer Rs. 200 per biswa in case of sale or Rs. 150 in case of mortgage, cannot be transferred to an outsider (*wo kul badast taqil na karsakega*.) The Court of first instance (J. C. Tilhar) gave the plaintiff a decree for pre-emption at the price fixed by the *wajib-ul-arz*, and this decree was on appeal affirmed by the District Judge of Shahjahanpur. The defendant Bahadur Singh thereupon appealed to the High Court.

Mr. W. K. Porter, Babu Jogindro Nath Chaudhri and Munshi Gobind Prasad, for the appellant.

Pandit Sundar Lal and Pandit Moti Lal Nehru (for whom Pandit Mohan Lal Nehru), for the respondent.

KN X and AIKMAN, JJ.—This appeal arises out of a suit brought by the respondent to enforce a right of pre-emption in respect of certain property set out in the plaint. In 1874 the owner of the property executed a deed of conditional sale in respect of that property in favour of the appellant Bahadur Singh. On the 30th of March 1900 a decree for foreclosure was passed in favour of Bahadur Singh. The claim for pre-emption is based

1904

BAHADUR  
SINGHv.  
RAM SINGH.

upon the *wajib-ul-arz*, terms of which are set out very fairly in the judgment of the learned District Judge. The Court of first instance decreed the suit, and that decree was affirmed in appeal. Bahadur Singh comes here in second appeal.

The question we have to decide is whether under the terms of the *wajib-ul-arz* the suit can be maintained. We have carefully considered the terms of that document, and we find no reason to dissent from the view taken by the Courts below. In our judgment the terms are wide enough to cover the case of a transfer effected in the manner described above. No doubt the plaintiff could, under the *wajib-ul-arz*, when the deed of conditional sale was made, claim the land and take over the bargain, but, as in *Sukhan* (1), a cause of action arises when the deed is executed and also when the land is foreclosed. The terms of the *wajib-ul-arz* require the pre-emptor to pay at a rate very low in comparison with the prices so fixed run with the land and are charged against *bona fide* purchasers. This may appear harsh to the appellant, but, as the learned Judge remarks, he has to consider the terms of the *wajib-ul-arz* when he enters into the transaction. The appeal is dismissed with costs.

*Appeal dismissed.*

1904

May 19.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burdett.*  
RAMHAJAN KUNWAR AND OTHERS (DEFENDANTS) v. GURCHARAN  
KUNWAR (PLAINTIFF).\*

*Suit for cancellation of document—Will—Suit for cancellation of will brought during the life-time of the testator.*

*Held* that no suit for the cancellation of a will can lie in the life-time of the testator.

THE plaintiff in this case sued his father and brother and his brother's sons for the cancellation of "a document, apparently a will" executed by his father on the 15th of January 1902. He alleged that "the defendant No. 1 (the father) was not competent to execute the will in respect of the

\* First Appeal No. 202 of 1902, from a decree of Rai Anant Ram, Subordinate Judge of Ghazipur, dated the 1st of August 1902.

(1) (1881) I. L. R., 3 All., 610. (2) (1886) I. L. R., 8 All., 102.

properties mentioned in the said will; nor did the execution in any way interfere with the possession and enjoyment of the plaintiff, but by maintenance of the will an injury is apprehended in future." The plaintiff prayed that "by determination of the fact that the will, dated the 15th January 1902 \* \* \* is void and ineffectual as against the plaintiff the said will may be cancelled." The defendants raised many defences to the action, and *inter alia* pleaded that "the plaintiff has no right under the law to bring this suit, and the reliefs asked for are altogether devoid of merit." The Subordinate Judge of Ghazipur held that the merits gave the plaintiff a decree upon appeal to the High Court.

The appellant.

*Shaq*, for the respondent.

BURKITT, J.—The suit out of which this is a ridiculous one. It is brought by the plaintiff to have a will of the defendant No. 1, a living man, cancelled. In the written statement the defendants draw attention to the fact that a suit claiming such relief is not maintainable. The will of a living man does not operate when it has been executed, but only upon his death. So long as a testator is living he may at any moment cancel his will and make a totally different disposition of his property. This power he possesses up to the hour of his death, provided he be competent then to execute a valid will. It is idle to contend that a party can come into Court and successfully claim to have the will of a living person set aside. Unfortunately the learned Subordinate Judge was of a different opinion. In his judgment he finds that a suit for cancellation of a will may be maintained. In this we are wholly unable to agree with him. It is said by the learned vakil for the plaintiff respondent, who has obtained a decree in the Court below, that this question was not raised in the memorandum of appeal. It is a matter, however, which the Court is bound to take notice of, and which is apparent, or ought to be apparent, to any lawyer. We allow the appeal, set aside the decree of the Court below, and dismiss the suit with costs in all Courts.

*Appeal decreed.*

1904

RAMBHAJAN  
KUNWAR  
v.  
GURCHARAN  
KUNWAR.



## FULL BENCH.

1904  
May 21.

*Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Banerji and  
Mr. Justice Burkill.*

KARAN SINGH AND OTHERS (DEFENDANTS) v. BHUP SINGH AND OTHERS  
(PLAINTIFFS) \*

*Hindu law—Joint Hindu family—Personal decree against father—Liability  
of son's interests in the joint family property.*

When the joint ancestral property of a Hindu family is attached in execution of a personal decree obtained against the father, the interests of the sons can only be executed if the latter can show that the debt in respect of which the decree was either tainted with immorality or was contrary to the religious duty of the sons to pay. *Ran Beni Madho v. Basdeo Patak* (2), *Ramaya Kounden* (3) and *Mussamut N* referred to.

In this case Karan Singh and others obtained a decree for profits in a Court of Revenue against the holders of mauza Shagarh. In execution of the decree the decree-holders attached certain immovable property belonging to the joint family of which Tota Ram was the head. The sons and grandsons of Tota Ram brought a suit against the decree-holders, in which they sought to set aside the attachment and sale in execution of the decree for profits against their father, to which they were not parties. The Court of first instance (Munsif of Haveli, Aligarh) gave the plaintiffs a decree, and on appeal that decree was affirmed by the Extra Additional Subordinate Judge. The defendants thereupon appealed to the High Court.

Munshi Gulzari Lal, who appeared with Babu Jogindro Nath Chaudhri for the appellants, argued that the question of the liability of the sons' shares in the present case was concluded by authority. He referred to *Mussamut Nanomi Babu-sin v. Modun Mohun* (4), *Beni Mudho v. Basdeo Patak* (2),

\* Second Appeal No. 471 of 1892, from a decree of Munsif Achal Behari, Extra Additional Subordinate Judge of Aligarh, dated the 17th of February 1902, confirming a decree of Babu Khetter Mohan Ghose, Munsif of Koil, dated the 9th of September 1901.

(1) (1890) I. L. R., 12 All., 209.  
(2) (1890) I. L. R., 12 All., 99.

(3) (1888) I. L. R., 16 I. A., 1.  
(4) (1885) I. L. R., 13 I. A., 1.



*Periasami Mudalias v. Seetharama Chethar* (1) and *Kishen Lal v. Banarsi Das* (F. A. No. 80 of 1902, decided March 8th 1904). It was submitted that the cases upon which the lower appellate Court had based its decision, namely, *Manbahal Rai v. Gopal Misra* (2) and *Ram Dayal v. Durga Singh* (3), had been wrongly decided.

1904

KARAN  
SINGH  
v.  
BHUP  
SINGH.

Mr. M. T. Agarwala (with whom Munshi Gobind Prasad)

that the liability of the sons  
nature of the debt. In

which payment was obligatory

died before decree and the

record as his representatives

ed against them. There were

that the sons were not liable

or which he had not collected

he learned counsel next urged

were separated; but failed to show

re the decree was passed. It was also

plants, judgment creditors, had failed to

te of attachment the remedy against the

ed by six years' limitation. The decision in

*Durga Singh* (3) was also relied on on behalf of

ents.

STANLEY, C. J., and BANERJI and BURKITT, JJ.—It appears to us that this appeal is concluded by authority. The facts are shortly as follows. On the 14th of December 1896 the appellants Karan Singh and others obtained a decree under the Rent Act for the profits of their recorded share in ancestral property. The decree was put into execution, and property, which was the joint property of Tota Ram and his sons and grandsons, was attached. Thereupon the suit out of which this appeal has arisen was instituted by the sons and grandsons of Tota Ram, to have it declared that their shares are not liable to sale in execution of that decree. There is no allegation, and could not be, that the debt in respect of which the execution proceedings were had was for immoral purposes or such a debt as the sons

(1) (1903) 14 Mad., L. I., 84.

(2) Weekly Notes, 1901, p. 57.

(3) (1890) I. L. R., 12 All., 209.

1904

KARAN  
SINGH  
v.  
BHUP  
SINGH.

and grandsons are relieved from their pious obligation to satisfy. The lower Courts, however, have come to the conclusion that the debt was a personal debt of Tota Ram and that his sons and grandsons were not liable in respect of it. The learned Additional Subordinate Judge upholding the decision of the Court of first instance in the judgment says that "this was a personal decree. Tota Ram's sons cannot be held to be liable for the payment of this. This was not a debt which was contracted for benefit of the joint family. The decree contends that there is no allegation as to the reality, the decree would bind ruling the High Court has taken *Bahal Rai v. Gopal Misra* (1). the sons and there being no evidence applied to their benefit, I think the ancestral property cannot be taken to suit against the father alone." It appears entirely erroneous. It is not necessary, in a son's liability for his father's debt, that it should be shown that the debt was contracted for the benefit of the family. It is sufficient, in order to establish the liability of sons to pay the debt of their father, if the debt be proved and the father show that it was contracted for immoral purposes or was such a debt as does not fall within the pious duty of the sons to discharge. From the decree of the Subordinate Judge the present appeal has been preferred. We may observe that the ruling upon which the learned Subordinate Judge relies has no bearing. Reliance has, however, been placed by the respondents upon another ruling of this Court in the case of *Ram Dayal v. Durga Singh* (2). In that case it was held that where, in execution of a simple money decree obtained against the father only, a member of a joint Hindu family, in respect of a bond debt incurred by him personally, the decree-holders attached the whole of the joint family property, they were not entitled to sell the interest of the sons in that property, and the sons could impeach the attachment of their shares upon the ground that it affected interests which the decree could not touch, and which therefore

(1) Weekly Notes, 1901, p. 57.

(2) (1890) I. L. R., 12 All., 209.

could not be attached under it, and that they were in a position to ask to have those interests exempted from the threatened sale in execution. We are unable to follow this decision. It appears to us not only to be inconsistent with an earlier decision of this High Court, but also with the rulings of their Lordships of the Privy Council in later cases. In the case of *Beni Madhodeo Patak* (1), reported in the same volume of the Law Reports, it was held that where a Hindu son comes to an agreement made by his father, or to a sale held or threatened in execution, there is nothing to show any fraud, or that the debt sold, or threatened with sale, or dealt with by a decree, is an illegal debt, to escape from having his interest in the property, or to wish that the debt he desires to discharge was of such a character that he would not be under a pious obligation to pay it. The judgment in that case a decision of their Lordships of the Privy Council in the case of *Meenakshi Naidu v. Ramaya Kounden* (2), is quoted, the facts of which are very similar, if not entirely similar, to those in the present case. It is true that the learned Judges who decided the case of *Ram Dayal v. Durga Singh* endeavoured to distinguish the case we have just cited by pointing out that in the one case the sale had actually taken place in execution of the decree, whereas in the other no sale had taken place but was only threatened. We are unable to see that that circumstance is a matter which can be regarded as of any importance in the determination of the question before the Court. In the earlier case of *Mussamut Nasomi Babuasin v. Modun Mohun* (3), it was held that in a sale which took place in execution of a decree passed upon a debt incurred by the head of a joint Mithila family, what passed by the sale depended upon the nature of the debt (*i.e.*, whether or not it was tainted with immorality) and the intention of the parties. In that case the debt was similar to the debt in the present case, as appears from

1904.

KARAN  
SINGH  
v.  
BHUP  
SINGH.

(1) (1890) I. L. R., 12 All., 99. (2) (1888) L. R., 16 I. A., 1.  
(3) (1885) L. R., 13 I. A., 1; s. c., I. L. R., 13 Calc., 21.

• 1904

KARAN  
SINGH  
v.  
BHRUP  
SINGH.

the judgment at page 16 of the Report. The decree in respect of which the property was sold was for mesne profits awarded to the decree-holder in respect of land from which he had been wrongfully ousted. In delivering the judgment of their Lordships Lord Hobhouse says:—"The circumstances of the present case do not call for any inquiry as to the exact extent to which the property was precluded by a decree and the father from calling into question the ground that the debt was merely illusory and fictitious, or the authority of *Devendya*, or nothing but Girdhari's claim passed by the sale. If his sale of the entirety, he might or the creditor might legally pass the sons can claim is that, notwithstanding execution proceedings, they ought not to inquire into the fact or the nature of the debt in assuming they have such a right, it will avail them if they can prove that the debt was not a sale." These authorities, it seems to us, control the result before us. We may also refer to an unreported decision of the Bench of this Court in the case of *Kishen Lal v. Laxmi Das*, First Appeal No. 80 of 1902, in which a similar question to that before the Court was decided and sons were held responsible for a debt similar to that in the present case. For these reasons we must allow this appeal, set aside the decrees of the lower Courts, and direct that the suit stand dismissed with costs in all Courts.

*Appeal decreed.*

## APPELLATE CIVIL.

1904  
May 25.*Before Mr. Justice Blair and Mr. Justice Banerji.*

DHANI RAM (PLAINTIFF) v. BHOLA SINGH (DEFENDANT).\*

1 (Local), Agra Tenancy Act, sections 175, 180 and 193—  
Code, section 2—'Decree'—'Order'—'Appeal'.It will lie from an appellate order of a Collector, as  
appellate decree, in proceedings under the Agraand what 'decrees' under the Agra  
and in the Civil Procedure Code,

occupancy tenant of certain  
and his holding to Bhola Singh  
and sold certain arrears of rent  
Singh to him to one Dhani Ram.  
and Bhola Singh in the Court of an  
second class to recover the arrears so  
was brought under section 93 (a) of Act  
the Court of first instance gave the plaintiff  
which an appeal was preferred by the defendant  
In his order on this appeal the Collector,  
stating the facts, continued :—

claims are denied, i.e., the liability. But I take exception at the  
outset to the status of the plaintiff. Dhani Ram, it seems to me, should  
have been non-suited at the beginning. The mere fact of purchasing from  
Jiwa Ram the right to collect certain alleged sums of money owing to Jiwa  
Ram does not produce or constitute a relationship of landlord and tenant  
between Dhani Ram and Bhola Singh. Dhani Ram might have had a right  
of suit if the transfer made by Jiwa Ram to him had been made with the  
consent of Bhola Singh. There is, however, no such consent here : in fact the  
*bai-namah* here is alleged by Bhola Singh to be merely fictitious, or at least  
collusive. I therefore hold that, as against Bhola Singh, Dhani Ram has no  
status whatsoever to sue for arrears of rent through the Rent Courts. He  
is nothing more than a broker for Jiwa Ram with no rights against Bhola  
Singh. I therefore accept this appeal and reverse the order of the lower  
Court. Costs will follow this award. The plaint may be returned under  
section 57 (c) of the Civil Procedure Code."

From this order an appeal was preferred by the plaintiff  
to the District Judge, who dismissed it, agreeing with the view

\* Second Appeal No. 762 of 1902 from a decree of F. W. Brownrigg, Esq.,  
District Judge of Aligarh, dated the 7th of August 1902, confirming a decree  
of W. J. E. Lupton, Esq., Collector of Aligarh, dated the 15th of April 1902.



1904

DHANI  
RAM  
P.  
BHOLA  
SINGH.

of the case taken by the Collector. The plaintiff then appealed to the High Court.

Munshi *Gulzari Lal*, for the appellant.

The Hon'ble Pandit *Mudan Mohan Mehta*  
Dr. *Satish Chandra Banerji*, for the respondent.

BLAIR and BANERJI, J.J.—The  
on behalf of the respondent

prevail. The suit was

Court of an Assistant Collector

decree of that Court an appeal

Collector. The Collector

maintainable in a Court of Revenue

returned to the plaintiff for

From that order of the Collector

District Judge. It is contended

that such an appeal did not lie.

Tenancy Act of 1901 provides that no

decree or order passed by any Court in

provided therein. Sub-section (2) of section

to the District Judge from an appellate decree

certain cases. If the order from which the appeal

Judge was preferred was an appellate decree, an appeal

lay to the Judge, as a question of jurisdiction had been

The Agra Tenancy Act does not define the word 'decree.' There-

fore, having regard to the provisions of section 193 of the Act,

the definition of the word as given in section 2 of the Code of

Civil Procedure must apply. Under that definition an order

directing a plaint to be returned is not a decree, being one of the

orders specified in section 588 of the Code of Civil Procedure.

Section 588 is, by the provisions of section 193 of Act No. II of

1901, declared to be inapplicable to suits and proceedings in the

Revenue Court. Consequently, if an appeal lay from an appel-

late decree of the Collector, it could only lie under the provisions

of the Tenancy Act, and that Act, as we have already said, allows

an appeal from an appellate decree of the Collector and not from

an appellate order. Consequently no appeal lay to the Judge,

and this appeal must fail. We accordingly dismiss it with costs.

*Appeal dismissed.*

## APPELLATE CIVIL.

1904.  
May 25.

*Before Mr. Justice Blair and Mr. Justice Banerji.*

AND ALI KHAN (DEFENDANT) v. BISMILLAH BEGAM AND OTHERS  
(PLAINTIFFS) AND MAHMUD KHAN (DEFENDANT).\*

*Issues—Appeal—Estoppel—Procedure.*

The suit has been dismissed against one of two defendants at first instance and the defeated plaintiff has not appealed from the decree. The addition of the defendant against whom the array of parties does not empower the Court to make in a decree which the Court of first instance has given in the decision of which Court the plaintiff has appealed from. *See Prasad Ram (1) and Alma Ram v. Abdul Kader Bhuyan (3) dissented.*

The suit was brought by the plaintiffs for profits agreed to be paid by the plaintiffs, at a private settlement of the estate of the ancestor Ewaz Ali Khan and the defendant Mahmud Khan, a lambardar, and Farzand Ali Khan, son of a deceased lambardar. The Court of first instance (Subordinate Judge of Moradabad) gave the decree against the defendant Mahmud Khan and Farzand Ali Khan, exempting the defendant Farzand Ali Khan from all

From this decree the plaintiffs did not appeal; but the defendant Mahmud Khan appealed, making the other defendant the principal party respondent to his appeal. The lower appellate Court (Additional District Judge of Moradabad) modified the decree of the first Court, and gave the plaintiffs a decree against both defendants jointly. Against this decree the defendant Farzand Ali appealed to the High Court, and the principal contention urged was that inasmuch as the plaintiffs had not appealed from the decree of the Court of first instance dismissing their suit as against the appellant in the High Court (Farzand Ali) they were not entitled to any relief as against him.

\* Second Appeal No. 1125 of 1902 from a decree of B. J. Dalal, Esq., Additional District Judge of Moradabad, dated the 22nd of August 1902, modifying a decree of Babu Pramatha Nath Banerji, Officiating Subordinate Judge of Moradabad, dated the 9th of June 1902.

(1) (1879) I. L. R., 2 All., 487. (2) (1883) I. L. R., 5 All., 266.  
(3) (1904) 8 C. W. N., 496.

1904

FARZAND  
ALI KHAN  
v.  
BISMILLAH  
BEGAM.

Sir Walter Colvin and Mr. Muhammad Ishar  
appellant.

Mr. Abdul Majid and Munshi Gokul Prasa  
respondents.

BLAIR and BANERJI, JJ.—The suit out of  
arises was a suit for profits against  
allegation that they were both  
dismissed the claim as again  
present appellant, Farzand  
dhri Mahmud Khan, again  
claim had been decreed, a  
present appellant, a party  
has held that Farzand Ali is  
then before the Court to pay  
Court made a decree to that effect  
also ordered him to pay costs. It  
the present appeal is filed. Farzand Ali  
from the suit by the Court of first instance  
not appeal against the decree dismissing him.  
is contended on behalf of the respondent that  
was acting within its rights in passing a decree against  
Ali. In support of that contention he cites the  
case of *Rup Jan Bibee v. Abdul Kader Bhuyan* (1). In that  
case the referring Judges have expressed grave doubts upon the  
question. The Full Bench heard the case, and gave a decision  
to the effect that the Court was acting within its powers in so  
passing a decree in a suit for contribution. That Court gives  
no reason for the conclusion at which it arrived. We are of  
course not bound by the authority of the Calcutta Court, and  
though we always consider with much respect the decisions of  
the other Courts in India, a decision which is unsupported by  
reasoning does not command the respect which we should  
otherwise have been bound to pay to it. On the other hand,  
there are two decisions of this Court: one in *Ranjit Singh v.  
Sheo Prasad Ram* (2) and the other in *Atma Ram v. Balkishen*  
(3). Both of those decisions practically go the length desired

(1) (1904) 8 C. W. N., 496. (2) (1879) I. L. R., 2 All., 487.  
(3) (1888) I. L. R., 5 All., 266.

appellant here. They hold that when a suit has been  
 against one of two defendants by the Court of first  
 the defeated plaintiff has not appealed against  
 decree, the addition of the defendant against  
 been dismissed to the array of parties does  
 ellate Court to pass against him a decree  
 nce declined to pass and in the  
 ntiff chose to acquiesce. We  
 decree of the Court below  
 Farzand Ali Khan. The  
 the costs of the appellant  
 late Court.

1904

FARZAND  
 ALI KHAN  
 v.  
 BISMILLAH  
 BEGAM.

*Appeal decreed.*

### LAL CRIMINAL.

1904

May 25.

*per Mr. Justice Know.*

PEROR v. MOHAN LAL.\*

*de, section 556—Meaning of "personally interested"*

*sttee of Municipal Board advising a prosecution.*

a Magistrate, who had been a member of a sub-committee of  
 Board which recommended the prosecution of a certain person for  
 alleged obstruction caused by him in a public thoroughfare, was not, by  
 reason only of this fact, "personally interested" in the case afterwards  
 initiated against such person so as to be debarred under section 556 of the  
 Code of Criminal Procedure from trying it. *The Queen v. Handsley* (1)  
 referred to.

IN this case one Mohan Lal was reported to the Municipal  
 Board of Bareilly as having created an obstruction upon a piece  
 of land which was said to be a public thoroughfare. The ques-  
 tion was considered by a Sub-Committee of the Board, which  
 recommended to the Board that a prosecution should be started  
 against Mohan Lal. The Chairman of the Board accordingly  
 initiated a prosecution, and the case came for trial before the  
 Joint Magistrate of Bareilly. The result of the case was that  
 an order under section 133 of the Code of Criminal Procedure  
 was passed against Mohan Lal. The Joint Magistrate had been  
 a member of the sub-committee of the Municipal Board which

\* Criminal Reference No. 212 of 1904.

(1) (1881) L R., 8 Q. B. D., 383.

1904

EMPEROR

v.  
MOHAN  
LAL.

had recommended the prosecution of Mohan Lal, and for this reason objection was taken by Mohan Lal to the effect that according to the provisions of section 556 of the Code of Criminal Procedure, the Joint Magistrate had no jurisdiction in the case against him. The order passed by the Magistrate was taken in appeal to the Sessions Judge, and the case to the High Court for orders under section 438 of the Code, expressing an opinion that the Joint Magistrate had no jurisdiction. Before the record was sent to the Sessions Judge, who originally passed the order, the Joint Magistrate, who was succeeded by the Chairman of the Municipal Board, had taken part in the prosecution of proceedings against the appellant. The objection was taken to this officer hearing the case of the Joint Magistrate.

*Babu Sital Prasad Ghosh*, for the appellant.

The Assistant Government Advocate (Mr. ...), for the Crown.

KNOX, J.—The learned Sessions Judge of Bareilly referred to this Court the following question, *i. e.*, whether having been at one time Chairman of the Municipal Board, and whether the Joint Magistrate, having been member of the Committee which advised the prosecution of one Mohan Lal for breach of the Municipal laws, either or both of them are so prejudiced thereby as to be unfit to dispose of the case of Mohan Lal, or whether section 556 of the Code of Criminal Procedure especially exempts both from any opinion of prejudice.

When a Court of Session reports a case to this Court it does so under section 438 of the Code of Criminal Procedure, and its report should contain a recommendation that the sentence be reversed or altered. There is no section I know of in the present Code of Criminal Procedure corresponding to the old section in Act No. XXV of 1861, which empowers a Court of Session to send up a question for the opinion of this Court. At the request, however, of the learned vakil who appears for the petitioners, I have taken up the case under section 439 of the Code of Criminal Procedure, and I have considered the question whether in the present case Mr. McNair can be held



1904

EMPEROR

P.  
MOHAN  
LAL.

be "personally interested" in this case, and therefore disqualified from trying it under the provisions of section 556 of the Code of Criminal Procedure. I have not thought it necessary to say whether the learned Sessions Judge is or is not personally interested. There is no grave doubt whether the word "try" used in section 556 can be applied to proceedings taken under section 435 or any other section of the Code in which he is not empowered to report the case for the orders of the Court. It is doing violence to the word "try" to apply it to any such proceeding.

Before me Mohan Lal applied to the Court for permission to build a *chabutra*. Later on, Mohan Lal sued a rival claimant in the Civil Court, and obtained a decree in his favour. He followed up this decree by taking possession of the piece of ground. A select committee of which Mohan Lal was a member, considered this to be an abuse of the Court's power and advised that steps should be taken against Mohan Lal. The papers went to Mr. Campbell, who directed the Court to take action. The extent then to which Mr. McNair was

concerned with these proceedings is that he was one of a certain body of members who, it should be observed, did not direct a prosecution but merely handed on a recommendation upon which the Chairman of the Board took action. Can such a person be said to be "personally interested" within the meaning of section 556 of the Code of Criminal Procedure? The learned vakil relies upon the illustration which is appended to that section, and upon an unreported case of this Court—Criminal Revision No. 327 of 1903, decided on the 6th August 1903. In the illustration the Magistrate who tries is the same person who in another capacity had directed the prosecution. In the case of *Ahmed Husain* it was alleged that the Joint Magistrate who tried the case was Chairman of a special meeting of a committee which ordered the prosecution of the accused. The case before me seems to fall within the principles laid down in *The Queen v. Handsley* (1). It is difficult to conceive what "personal

(1) (1881) L. R., 8 Q. B. D., 383.

1904

EMPEROR  
v.  
MOHAN  
LAL.

interest" Mr. McNair could possibly have had in the removal of these casks, especially if we concede that the interest intended is a substantial interest giving rise to a real bias and not mere to the possibility of a bias. I do not think it necessary interfere.

1904  
May 25.

## APPELLATE CRIMINAL.

*Before Mr. Justice*

EMPEROR v. MAUI

*Act No. XLV of 1860 (Indian Penal Code)*

*Trust—"Property"—Criminal*

*Held* that a cancelled cheque falls within "property" as used in section 405 of the Indian Penal Code, and that a conviction for criminal breach of trust the value of the property in respect of which the breach of trust is so far as section 95 of the Code is concerned, quite immaterial.

THE facts of this case are as follows:—

One Tulshi, a Jat, filed a suit against Chain Sukh, a refiner of Nehtor, and Ibn Hasan, a zamindar of the same place in the Munsif's Court to recover the price of molasses, which the plaintiff had supplied to Chain Sukh and for which he had not been paid. On the 13th of June 1902 a decree was passed *ex parte* against Chain Sukh; but on Chain Sukh's application this *ex parte* decree was set aside and the suit restored. To help him in the conduct of this suit Chain Sukh employed Maula Bakhsh, who, though by caste a dyer, was a person who made a practice of helping litigants with their cases. Maula Bakhsh seems to have taken an active interest in the suit against Chain Sukh, and in the course of the preparation of the defence was entrusted by Chain Sukh with a bundle of cancelled cheques, which Chain Sukh intended to file as exhibits. On the 25th of September 1902, the date fixed for the hearing of the case, Chain Sukh came into Bijoor. He handed the bundle of cheques and an account book to Maula Bakhsh. They went together to the house of Hamid Hasan, Chain Sukh's vakil. The vakil examined the cheques, and made them over

to his clerk in order that a list might be prepared for Chain Sukh. The clerk prepared the list, and Chain Sukh and Maula Bakhsh left together. Chain Sukh appears to have given the Maula Bakhsh after leaving Hamid Hasan's house. About 10 o'clock in the morning. By noon Maula Bakhsh appeared with the cheques, and could not be

subsequently arrested and committed to the District Sessions Judge of Moradabad under section 408 of the Indian Penal Code for two years' rigorous imprisonment. On appeal the sentence Maula Bakhsh appealed

the appellant.

His counsel (Maulvi Ghulam Mujtaba), for

Maula Bakhsh, a dyer by caste, has been convicted of an offence under section 408 of the Indian Penal Code and sentenced to rigorous imprisonment for two years and six months. It appears from the evidence of Hamid Hasan and Inayat Ahmad, vakils, that Maula Bakhsh was in the habit of attending Courts and offering or giving help to litigants. In April 1902 one Tulshi, a Jat, filed a suit against Chain Sukh, a sugar refiner of Nehtor, and Ibn Hasan, zamindar of the same place, for the price of molasses, which, as Tulshi said, he had supplied to Chain Sukh and for which he had not been paid. The suit was filed in the Court of the local Munsif, and on the 13th of June a decree was passed *ex parte* against Chain Sukh. Chain Sukh applied and got this order set aside, and it was to help him in the conduct of the revived suit that Chain Sukh says he employed the petitioner. There is evidence, which has been believed, that Maula Bakhsh did take a more or less active part on Chain Sukh's side. Hamid Hasan, the wakil, states that two or three times Maula Bakhsh brought a bundle of cheques for his inspection, and that on the day of hearing he intended to file these cheques in the case. On the 25th of September, the date fixed for hearing, Chain Sukh came into Bijner. He handed the bundle of cheques and account book

1904

EMPEROR  
v.  
MAULA  
BAKHSH.

1904

EMPEROR  
v.  
MAULA  
BAKHSH.

to Maula Bakhsh. They went together to the house of Hamid Hasan. The vakil examined the cheques, and made them over to his clerk in order that a list might be prepared for Chain Sukh. The clerk prepared the list, and Chain Sukh and Maula Bakhsh left together. Chain Sukh says he gave the cheques to Maula Bakhsh. In this he is corroborated by Chaudhri Budhan Singh, who saw the cheques at Samaj Sarai. This was at 10 a. m. By noon Chain Sukh had disappeared with the cheques. The last that was seen of him was three miles away from Bijnor.

These are the main facts found. I was at first inclined to doubt, on careful consideration of the evidence of the witnesses Chaudhri Budhan Singh and K. the conclusion that there is no good ground for the view taken by the learned Judge.

But it was strongly pressed upon my attention by the learned counsel for Maula Bakhsh that the element of dishonesty, an essential ingredient, so to speak, which must be found present before a conviction can be rightly had under section 408, was absent, or at any rate was not proved. No wrongful gain had been shown to have accrued to Maula Bakhsh, and the wrongful loss suffered or said to have been suffered by Chain Sukh was purely hypothetical. I was much impressed by this argument and took time to consider and consult authorities.

It is true that the so-called cheques had all of them been honoured, so to speak, and were no longer of value as instruments upon which money could be procured, and the question really turns upon how far these so-called cheques, which are not shown to have had at the time of their abstraction higher value than mere pieces of paper, could be held to be property. I have come to the conclusion that they were property within the meaning of the Indian Penal Code, even assuming that they were of no value further than the paper upon which they were written. The question of value, except so far as section 95 is concerned, appears quite immaterial and the conviction under section 408 of the Indian Penal Code is a good and sound conviction.

I have considered the question of sentence, and I do not find that, taking the circumstances of the case as proved, it is very severe.

The petition is dismissed.

1904

EMPEROR

v.  
MAULA  
BAKRSH.

## APPELLATE CIVIL.

1904

May 25.

*Mr. Justice Blair and Mr. Justice Banerji.*

II AND OTHERS (DECREE-HOLDERS) v. POLA RAM  
JUDGMENT-DEBTOR.\*

Act (Local) No. II of 1901 (Agra  
193—'Order'—'Decree'—Appeal.

to District Judge from an order of an  
if such order, by the force of section 2  
into a decree.

and others, decree-holders, applied

decree against their judgment-debtor

the Court of an Assistant Collector of the first class.

were met with an allegation that by delivery of large quantities of grain to the decree-holders the decree had been partially satisfied, and it was prayed that part satisfaction of the decree might be entered up. The Court, however, disbelieved the judgment-debtor's allegations, and disallowed his application to certify the payments set up by him. The judgment-debtor appealed to the District Judge, who accepted the judgment-debtor's plea of payment, and reversed the order of the Assistant Collector of the first class. The decree-holders thereupon appealed to the High Court, urging that no appeal lay to the Court below.

Pandit *Moti Lal Nehru* and Dr. *Tej Bahadur Sapru*, for the appellants.

Munshi *Gulzari Lal*, for the respondent.

BLAIR and BANERJI, JJ.—This appeal arises out of an order passed in execution of a decree by an Assistant Collector of the first class. The sole point raised in the appeal before us is whether an appeal lay from that order to the District Judge. The decree was passed in a suit falling under No. 16 of Group B,

\* Second Appeal No. 690 of 1903, from a decree of W. F. Wells, Esq., District Judge of Agra, dated the 24th of June 1903, reversing an order of Babu Rup Narain, Assistant Collector, first class, of Muttra, dated the 30th of March 1903.



1904

KRAMAG  
SINGHv.  
POLA RAM.

Schedule IV of Act No. II of 1901. We have examined the sections which provide for appeals against orders of officers of different grades, and we find a marked difference between the cases in which appeals are allowed from orders of Assistant Collectors of the second class and Assistant Collectors of the first class. It is provided in section 176 of Act No. II of 1901 that an appeal lies from the Collector from the decree or order of the second class in cases which are specified in group D of the Schedule. It is provided that the District Judge from the orders of the first class in the suits specified in Schedule IV. In that section there is no doubt intentionally. By the section appeals are allowed exclusively in the case of orders of the Collector. The contention on behalf of the appellant by necessary inference the provision of section 176 allows an appeal to the District Judge in those cases in which the order of an Assistant Collector of the first class amounts to a decree. There can be no question in the present case that the order passed by the Assistant Collector was an order within the meaning of section 244 of the Code of Civil Procedure. An order under that section is by virtue of section 2 of the Code of Civil Procedure included in the term 'decree', so that, though the section does not in itself deal with appeals at all, it seems to us that by applying to the provisions of the Agra Tenancy Act of 1901 the procedure enacted in the Code of Civil Procedure, it confers upon such orders the status of decrees, and consequently there is a right of appeal from such orders under section 177. This conclusion is in harmony with that which has been arrived at in an unreported case—*Execution Second Appeal No. 275 of 1903*, decided by one of us last year.\* As to the propriety of that decision we

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\* The judgment in this case was as follows:—

BANERJI, J.—The question in this case is whether the appeal which the present appellant preferred to the lower appellate Court from an order of the Assistant Collector, dated the 5th December 1902, lay to that Court. The Court below has held that no appeal lay. In my judgment the contention

entertain no doubt. We are of opinion therefore that the Court below rightly exercised its jurisdiction in appeal. This appeal therefore must fail. It is accordingly dismissed with

1904

KHARAG  
SINGHv.  
POLA RAM.

ant must prevail. The order appealed against was an order of a decree. An order granting execution is an order of the Code of Civil Procedure, which by reason of section Tenancy Act of 1901 is applicable to proceedings in. It appears that the respondent obtained a decree for arrears not having been paid, applied for ejectment for reasons into which it is not necessary now to go. The application was made dismissed it. Subsequently the order dated the 5th December 1902 directing execution. It is from that order that the appeal to the Court below was made. Section 177 of the Act provides that an appeal lies from the decree of an Assistant Collector of the first class. Any of the suits included in group A in which the value of the subject-matter exceeds Rs. 100. This was a suit included in Group A in which the value of it exceeded Rs. 100. If the order from which the appeal to the Court below was made is a decree, undoubtedly an appeal did lie to that Court under section 177. As I have already said, the order being one granting execution of the decree was an order under section 244 of the Code of Civil Procedure, and consequently came within the definition of the word 'decree.' Whether or not the appeal would succeed upon the merits is a question with which I am not concerned. Having regard to the provisions of the law referred to above, I think an appeal lay to the lower appellate Court, and the learned Judge was wrong in refusing to entertain it. I accordingly allow the appeal and remand the case under section 562 of the Code of Civil Procedure to the Court below for disposal according to law. Costs here and hitherto will abide the event.

*Appeal dismissed.*

## REVISIONAL CRIMINAL.

1904

May 26.

*Before Mr. Justice Knox.*

EMPEROR v. NANHE AND OTHERS.\*

*Criminal Procedure Code, section 556—Meaning of "personally interested"—*

*Magistrate making himself a witness in a case which he is trying.*

On a day when the Courts were closed for the Christmas holidays two persons came to a Magistrate's private house, and there made an oral complaint to him. When the Courts reopened the same persons filed a written complaint in the Magistrate's Court, which resulted in certain persons being put upon their trial before the same Magistrate for an offence under section

\* Criminal Revision No. 178 of 1904.

1904

EMPEROR  
v.  
NANHE.

323 of the Indian Penal Code. During the course of the trial the Magistrate considered it his duty to record his own evidence as to the circumstances attending the making of the oral complaint, at his house, and he cross-examined and re-examined. Held that the Magistrate was considered to be "personally interested" in the case within the meaning of section 556 of the Code of Criminal Procedure. *In the cases of Ganeshi (1) and The Queen v. Handsley (2) followed. v. Abdul Baki Miah (3), Girish Chunder Ghose v. Queen Empress v. Manikam (5) and Serjeant v. Dale (6) v.*

THE facts which gave rise to this application were as follows: During the Christmas vacation of 1903 the applicant, Nanhe, and Anwar came to the bungalow of the complainant at Budaun, and showed him certain injuries which he had received at the hands of two men—a Hindu and a Muslim man; their names were not mentioned. After the Christmas vacation a writ was filed in the Joint Magistrate's Court, and in consequence of this certain persons were put upon their trial before the Joint Magistrate. During the trial the Joint Magistrate considered it expedient to place upon the record what took place on the 10th of December, and he accordingly recorded his own evidence on oath, and was duly cross-examined and re-examined. As the result of the trial the three accused were convicted and sentenced, one to one month's rigorous imprisonment, the other two to two small fines. Against these convictions and sentences an application in revision was presented to the High Court, and it was contended that the trying Magistrate being himself a witness in the case had no jurisdiction to try it.

Mr. C. Dillon, for the applicant.

The Assistant Government Advocate (Mr. W. K. Porter), for the Crown.

KNOX, J.—The sole ground on which I am asked to interfere with an order passed by the Joint Magistrate of Budaun, dated the 11th of March 1904, and sentencing the applicant Nanhe to one month's rigorous imprisonment and the applicants Mohi-ud-din and Husaini to a fine of Rs. 15 each for an offence under section 323 of the Indian Penal Code is that, as the

(1) (1893) I. L. R., 15 All., 192. (4) (1895) I. L. R., 20 Cal., 857.  
(2) (1881) L. R., 8 Q. B. D., 383. (5) (1896) I. L. R., 19 Mad., 263.  
(3) (1894) I. L. R., 21 Cal., 920. (6) (1877) L. R., 2 Q. B. D., 558.

trate was a witness in the case, he had no jurisdiction to  
and his proceedings are therefore void.

to understand how the Joint Magistrate came to be  
case and to judge of the nature of interest he is

it will be necessary to set out a short state-  
ring the Christmas vacation of 1903 two men,

ame to the Joint Magistrate at his bunga-

juries which they said they had received

n—a karinda and a Musalman. The

d Amirdula were not mentioned. As

cation was over, the written complaint

was instituted was placed before the

thereupon took cognizance of the case

. During the hearing of it, however, he

cient that he should place upon the record

se on the 26th of December. He accordingly

statement on oath, which he himself recorded. He

permitted himself to be cross-examined and re-examined. The

cross-examination and the re-examination was also recorded

by the Magistrate. At the time no protest was made and no

question of want of jurisdiction was raised. The deposition

was recorded on the 10th of February, the judgment was not

given till the 11th of March, and from the date of the deposi-

tion to the date of the judgment this question was never put

forward.

Now, however, objection has been taken by the learned  
counsel for the applicants, who based his argument upon section  
556 of the Code of Criminal Procedure, and referred to the  
[precedents *Hari Kishore Mitra v. Abdul Baki Miah* (1), *Grish*  
[*Chandra Ghose v. Queen Empress* (2), *Queen-Empress v. Mani-*  
*kam* (3). He also invited the attention of the Court to the  
remarks of Mr. Justice Lush in *Serjeant v. Dale* (4). Lush, J.,  
said:—"The law does not measure the amount of interest which  
a Judge possesses. If he has any legal interest in the decision  
of the question? one way he is disqualified, no matter how small  
the interest may be. The law in laying down this strict rule

(1) (1894) I. L. R., 21 Cal., 920.

(2) (1893) I. L. R., 20 Cal., 857.

(3) (1896) I. L. R., 19 Mad., 263.

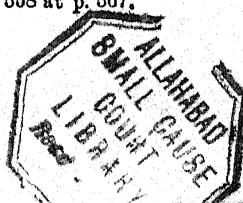
(4) (1879) L. R. 2 Q. B. D., 558 at p. 567.

1904

EMPEROR .

T.

NANHE.



1904

EMPEROR  
v.  
NANHE.

has regard, not so much perhaps to the motives which might be supposed to bias the Judge, as to the susceptibilities of the litigant parties. One important object, at all events, is to sweep away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice which is so essential to its peace and security." The circumstances of the cases in which it was found that the Magistrate of interest in the proceedings before him, differ from the circumstances of the present case. In the first case the Assistant Magistrate made a very thorough inspection of the scene himself and felt that he was not in a position to give evidence upon the information which he had obtained. In the second case the Magistrate had not gone into the witness-box, but had embodied in his judgment matters which came to his personal knowledge and under his personal observation, and matters, which, if relevant, he should have deposed to on oath in the witness-box. It is true that the Court did in that case lay down that no Magistrate can try a case in which he is himself a witness. In the Madras case the Magistrate made a local inspection of the scene of the alleged offence for the purpose of seeing what damage had been done, and the Court held that the Magistrate's view of the *locus in quo* was what influenced him in finding that the complaint of actual damage being caused was true, and the defence that no damage was done was false. In the present case the Magistrate appears to have taken no further part than is done by any Magistrate before whom an allegation is made orally with a view to his taking action under the Criminal Procedure Code, that some person had committed an offence. The explanation to section 556 lays down one test whether a Magistrate shall or shall not be deemed to be personally interested within the meaning of the section. If the reason for imputing interest to the Magistrate is only that he had viewed the place in which an offence has been alleged to have been committed or that he has made an inquiry in connection with the case he is not to be deemed "personally interested" so far as to oust his jurisdiction. The making of an inquiry



certainly goes further than all that is attributed to the Magistrate in the present case. In the Full Bench ruling *In the matter of the petition of Ganeshi* (1), the Court preferred to follow the lines laid down in *The Queen v. Handsley* (2). I held that that which disqualifies a Magistrate in a case is a substantial interest giving rise to a real possibility of a bias. Cases may arise in which it is expedient, if objection is taken at the proper time, that the case should be transferred so as to remove any real ground actually present in the mind of the accused person that he will not get a fair trial. There are no grounds whatever for supposing that any such suspicion existed in the mind of the accused in the present case. This is evident from the fact that they never raised the question before. It is clearly an after-thought which has occurred to them as a means for escaping from the consequence of the act of which they have been found guilty. I therefore decline to interfere.

1904

EMPEROR  
v.  
NANHE.

## PRIVY COUNCIL.

RAMPAL SINGH (DEFENDANT) v. RAM PRASAD SINGH AND  
OTHERS (PLAINTIFFS).

[On appeal from the Court of the Judicial Commissioner of Oudh, Lucknow.]  
*Res judicata—Civil Procedure Code, section 13.—Question directly and substantially in issue—Omission to raise ground of defence in former suit.*

*H*, an Oudh taluqdar, executed a deed of gift in 1859 by which he purported to give to *R* (the only son of his elder son who was dead) the whole taluq with the exception of a few villages. In 1871 a suit brought by *H* against *R*, to have it declared that notwithstanding the deed of gift the proprietary right in the taluq was vested in him was settled by a compromise, by the terms of which various portions of the taluq were to be held for life by *H*, *R* and *D* the mother of *R*, and on the expiration of those three lives *L* (the younger son of *H*) and his heirs were to succeed to the whole of the estate. This compromise was embodied in a decree of Court. In 1876 *H* and *L* brought a suit against *R* and his wife to cancel a deed conveying a portion of the taluq to the latter as being in excess of the powers of alienation given to *R* by the compromise of 1871. The defendants in that suit did not contest the validity of the compromise, but upheld the alienation as valid, and

P. C.  
1904

July 12, 15.  
November 11.

*Present* :—Lord DAVEY, Lord ROBERTSON, and Sir ARTHUR WILSON.

(1) (1893) L. R., 15 All., 192.

(2) (1881) L. R., 8 Q. B. D., 383

1904

RAMPAL  
SINGH  
v.  
RAM  
PRASAD  
SINGH.

asserted that *L* had no such interest in the property as entitled him to and issues were raised on those points. The Court held that *L* was remainder man under the terms of the agreement," that he "or his representatives will certainly inherit the estate some time or other," "entitled to sue; that the alienation was void as against *H* of the power reserved by the compromise to *R*, who was alienate for his life; but that no right had yet accrued the possession of *R*'s wife. In 1889 after the death of the taluq was attached by creditors of decree without limit of title. In a suit brought against *R*, his judgment creditors, and the purchaser declared that the plaintiff was entitled as the immediate absolute estate in the portion sold on the death of *R*, and death the sale would be inoperative as against him, the defendant. the defence that he had by virtue of the deed of gift of 1859 an absolute which was not displaced by the effect of the compromise and the decree embodying it.

*Held* by the Judicial Committee (confirming the decision of the Judicial Commissioners of Oudh) that the decision in the suit of 1876, as having established between *R* and *L* (the father and predecessor in title of the plaintiff) that *R* had only a life interest in the taluq, and that *L* (and therefore also the plaintiff as his heir) had a vested interest in remainder, was *res judicata* in the present suit.

APPEAL from a judgment and decree (November 15th 1899) of the Court of the Judicial Commissioner of Oudh, which reversed a judgment and decree (April 29th 1899) of the Subordinate Judge of Partabgarh.

The chief question raised on the appeal was the nature of the interest possessed by Raja Rampal Singh, the appellant, in the estate of Rampur Kaithoula a taluq in Oudh. The second Summary Settlement of that taluq was made with Raja Hanwant Singh, to whom a taluqdari sanad was granted on 28th October 1859, and after the passing of the Oudh Estates Act (I of 1869) his name was entered in lists I and II prepared in accordance with the provisions of that Act. Raja Hanwant Singh had two sons, Partab Singh and Lachman Singh. The elder, Partab Singh, died before his father, leaving a son, Rampal Singh, the present appellant. In order to settle the succession to the estate, and prevent disputes between his grandson Rampal Singh, and his son Lachman Singh, Hanwant Singh on 2nd April 1859 executed what purported to be a deed of gift of the whole estate (with the exception of six villages) in

favour of Rampal Singh, then a child; and Rampal Singh's name was entered on the revenue registers by an order dated January 1860. Hanwant Singh, however, remained in possession and managed the estate. On 5th October 1864 Rampal Singh, who was then about 15 years of age, leased a portion of the estate called Kalakankar to Hanwant Singh for his life, and the remaining portion of the estate called Dharupur was placed under the management of Rampal Singh.

When Rampal Singh attained majority, disputes arose between him and Hanwant Singh, which eventually on 4th October 1867 they agreed to refer to arbitration; and in the arbitration proceedings Dharupur was also awarded to Hanwant Singh, who was directed to make an allowance to Rampal Singh for his maintenance. On 24th January 1869 Rampal Singh leased six more villages to Hanwant Singh for life, rent-free, and the Dharupur portion of the estate was placed under the management of the Deputy Commissioner. Disputes continued between Hanwant Singh and Rampal Singh, and a suit was in 1871 brought by the former against the latter in the Court of the Deputy Commissioner of Sultanpur for a declaration that, notwithstanding the deed of gift dated 2nd April 1859, he (Hanwant Singh) was the absolute proprietor of the whole taluq. This suit was compromised on 1st September 1871, the deed of compromise providing that Rampal Singh should hold the Dharupur portion of the estate for life with remainder to his mother Dirgaj Kunwar (widow of Partab Singh), with remainder to Hanwant Singh; that Hanwant Singh should hold the Kalakankar portion of the estate for his life with remainder to Rampal Singh for life, with remainder to Dirgaj Kunwar for life; and that the ultimate remainder to both estates on the deaths of Hanwant Singh, Rampal Singh, and Dirgaj Kunwar should be to Lachman Singh and his heirs. A petition was presented to the Court praying that the suit might be disposed of in accordance with the compromise, and on 7th September 1871, under section 98 of Act VIII of 1859, the then Code of Civil Procedure, a decree was made accordingly. Appended to the decree was a note to the effect that "the Court directs that each party shall within two months draw up a formal

1904

RAMPAL  
SINGH  
v.  
RAM  
PRASAD  
SINGH.

1904

RAMPAL  
SINGHv.  
RAM  
PRASAD  
SINGH.

agreement embodying the terms of the compromise filed in this Court:" but the only formal agreement afterwards was one executed on 30th October 1871 by Hanwant alone, and duly registered.

On 5th June 1873 Rampal Singh made a gift of estate in certain villages in the taluq to his wife war. Thereupon Hanwant Singh and Lachmar a suit in the Court of the Deputy Commissioner against Rampal Singh and Subhao Kunwar to set aside the gift of 1873 as being in violation of the terms of the promise of 1871 and the decree made on it, and pray that it might be declared void, and the donee be dispossessed, that the rights of Hanwant Singh and Lachman Singh might be declared in conformity with the compromise and decree. In defence it was contended that Rampal Singh had power to alienate as he had done, and that the gift was therefore valid; that the possession of Subhao Kunwar could not be disturbed during the life-time of Rampal Singh; and that Lachman Singh had no right to sue, as such right would not accrue to him until the deaths of Hanwant Singh, Rampal Singh and Dirgaj Kunwar. No plea was raised that the compromise and decree of 1871 were invalid. In that suit issues were settled:—  
“(1) clause 2 of the *sulehnama* standing as it does, can a cause of action accrue to the plaintiff Raja Hanwant Singh from an alienation made during the life-time of the defendant Raja Rampal Singh of the nature of the alienation in suit” and “(9) Has a cause of action accrued to Babu Lachman Singh or not?”

On these issues the Deputy Commissioner on 31st October 1876 gave judgment as follows:—

“With regard to issue 9. Has a cause of action accrued to Babu Lachman Singh or not? The Court was of opinion that plaintiff's replication is sound, *viz.*, that whereas the decision of the Judicial Lords of Her Majesty's Privy Council, relied on by defendant, relates to a claim to a future inheritance, the present claim relates to an actual breach of agreement, and is, therefore, not covered by the ruling cited. If the ultimate devolution of the estate to Babu Lachman Singh and his heirs were only a mere doubtful and contingent probability the ruling might be relevant. But his position is far different to this, he is a certain remainder-man under the terms of the agreement, clause 7. That clause runs thus:—‘On the death of the last survivor of these three

persons, to wit, Raja Hanwant Singh, Raja Rampal Singh, and Dirga Kunwar, mother of Raja Rampal Singh, Babu Lachman Singh, the second son of Raja Hanwant Singh, and his heirs or representatives, under the meaning of Act I of 1869, section 22, shall succeed to the whole of the taluqa of Rampur Kaithoula, but the said Babu Lachman Singh, or his heirs or representatives, shall not exercise any interference or control whatever over the said taluqa, except over the six villages alluded to in clause 8 hereof, till the death of Raja Rampal Singh and of his mother, Dirga Kunwar.' By this deed Babu Lachman Singh or his representatives will certainly inherit the taluqa in time or other. Issue 9, accordingly, was found against the defendants in this shape, that if cause of action be found to have accrued to plaintiff, Raja Hanwant Singh, it will also have accrued to plaintiff, Babu Lachman Singh."

and on the issue whether the deed of gift was void as against Hanwant Singh the Court said:—

"As regards the cancelment of the deed of gift it appears to the Court that as in drawing up this instrument the Raja defendant has gone beyond the powers assigned to him under clause 9 of the agreement, the instrument must be pronounced to be null, void, and of no effect whatever, either as authorizing the present possession of the Rani defendant or the devolution of the gifted villages after her death. The decree will pronounce accordingly."

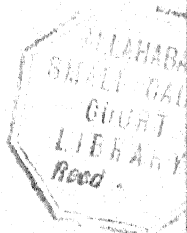
As to the right to eject Rani Subhao Kunwar the judgment proceeded:—

"With regard, lastly, to that portion of the claim which seeks to eject the Rani defendant from the gifted villages, the Court finds that no right whatever to claim such ejectment has accrued to the plaintiff, Raja Hanwant Singh. Clause 2 of the agreement provides 'that the estate of Dharupur shall remain and continue in the proprietary possession of the said Raja Rampal Singh during the life-time of the said Raja Hanwant Singh without the power to will, sell, mortgage or otherwise transfer for a period beyond his life or otherwise dispose of the said taluqa or any portion thereof, and that the said Raja Rampal Singh is declared to be at once competent to receive all the profits arising out of the said estate.' It is not contended for plaintiffs, and it could not reasonably be contended that this clause does not empower the Raja defendant to allow his wife, the Rani defendant, to exercise possession during his life on any terms that may be arranged between themselves, as long as no sort of alienation beyond his life is made. By the decree about to be given the basis of the possession of the Rani defendant is altered, but the Court holds that so long as Raja Rampal Singh is alive he alone has the right to remove her from possession as long as the possession exercised by her is of the same nature as that which might have been exercised by himself under the agreement. In this view the Court will not decree the ejectment of the Rani defendant from the gifted villages."

The Deputy Commissioner thus held that the deed of gift of 5th June 1873 was in contravention of clause 9 of the

1904

RAMPAL  
SINGH  
v.  
RAM  
PRASAD  
SINGH.





1904

RAMPAL  
SINGH  
v.  
RAM  
PRASAD  
SINGH.

compromise; that under clause 2 of the compromise Rampal Singh had a life interest in the villages mentioned in the deed of gift of 5th June 1873, and that the Rani Subhao Kunwar could accordingly hold those villages for Rampal Singh's life-time, and therefore refused to eject her from the villages.

Hanwant Singh died on 30th June 1881; Durg died in 1882, and Lachman Singh died on 1st July

On 23rd May 1889 Messrs. Eyre and Spottis obtained a decree against Rampal Singh brought in execution the village of Parbara, part of the taluq Rampur Kaithoula, and on 21st January 1896 it was purchased by Basant Singh. Having failed in the execution proceedings to limit the sale to the life-interest of Rampal Singh, Ram Prasad Singh, son of Lachman Singh, instituted, on 24th March 1896, the suit out of which the present appeal arose against Rampal Singh and Basant Singh, and Messrs. Eyre and Spottiswoode. The plaintiff prayed for a declaration that the sale would be inoperative and of no effect against the plaintiff after the death of Rampal Singh, the plaintiff claiming as the immediate reversioner on the death of Rampal Singh.

The defence, so far as material, was that Rampal Singh acquired an absolute title to the whole taluq under the deed of gift dated 2nd April 1859; that the compromise dated 1st September 1871 was invalid, not having been registered; and that neither Lachman Singh nor the plaintiff could claim the benefit of the compromise, or the decree on it, not having been parties thereto. During the course of the hearing in the Court of first instance the plea was taken that the decree of the Deputy Commissioner of 31st October 1876 had finally decided that Rampal Singh had only an interest for his life in the taluq, the vested estate in remainder being in Lachman Singh and his heirs; and that decision constituted a *res judicata* in this suit.

The Subordinate Judge held that the judgment of 31st October 1876 did not operate as *res judicata*; that the compromise not having been registered was inadmissible in evidence; that Rampal Singh had acquired an absolute title to the whole taluq

under the deed of gift of 2nd April 1859, which title had never been displaced; and that the plaintiff not being a party to the decree on the compromise could claim no benefit under it.

On appeal by the plaintiff the Court of the Judicial Commissioners of Oudh (Messrs. *Blennerhasset* and *Deas* delivered judgment of the Court, of which the following is the serial portion:—

The main contention in appeal is that the judgment of 1876 finally decides between the parties that Raja Rampal Singh had only a life-interest in village Parbara. The appellant has cited *Raja of Pittapur v. Buchi Satayya* (1), in which it was held that an estoppel is binding notwithstanding that the suit which raises it relates to a different property. He has also referred to explanations 1 and 2 to section 13 of the Code of Civil Procedure, and has cited *Kameshwar Prasad v. Raj Kumari Rattan Kumwar* (2) as showing that any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. He has also cited *Pahalwan Singh v. Maheshur Baksh Singh* (3), in support of the view that it is not necessary that a specific issue should have been raised in the former suit: it is sufficient if the matter has been decided in effect or by necessary implication though not in express words. He has cited *Kali Krishna Tagore v. Secretary of State for India* (4), where it was held that in order to see what was in issue in the former suit or what was heard and finally decided, the judgment must be looked at.

"The plaintiff appellant contends that Raja Rampal Singh has consistently acted on the compromise as a binding document, that he obtained mutation of names in his favour of Raja Hanwant Singh, on the basis of that compromise, that he brought suits against mortgagees to recover properties mortgaged by Raja Hanwant Singh and that he is now estopped from reprobating that transaction.

"The case of Raja Rampal Singh has been argued in a very elaborate manner by Pandit Sundar Lal. He contends that the tabular form of the decree of the 7th September 1871, does not specify in whose favour the decree has been passed or against whom, and that it contains no mandatory order. It states that the application has been disposed of according to the agreement between the parties, in accordance with the order of the Revenue Court directing the parties to draw up a formal agreement. An agreement was drawn up by Raja Hanwant Singh on the 30th October 1871, which embodies *verbatim* the terms of the compromise as filed in the Court. After some process in execution Raja Rampal Singh signed a document on the 26th February 1874, which has not been registered and has not been filed in this case. The contention of the learned advocate is that the Court merely

(1) (1884) L. R., 12 I. A., 16: I. L.

R., 8 Mad., 219.

(2) (1892) L. R., 19 I. A., 234: I. L.

R., 20 Calc., 79.

(3) (1872) 12 B. L. R., 391.

(4) (1888) L. R., 15 I. A., 186: I.

L. R., 16 Calc., 178.

1904

RAMPAL  
SINGH

v.

RAM  
PRASAD  
SINGH.

1904

RAMPAL  
SINGH  
v.  
RAM  
PRASAD  
SINGH.

directed the execution of a document by the parties, but did not embody in its judgment or decree, the terms of the final decision, and that consequently no evidence, other than the deed, could be produced to prove the transaction.

"The learned advocate for Raja Rampal Singh argued that by the deed of gift of 2nd April 1859 Raja Rampal Singh became the absolute owner of the estate and that nothing has since occurred to alter his title to the estate that he remained in possession till 1871, and he is in possession of the estate. The decree of 1871 is defective and contains no mandatory provision. The judgment also does not finally dispose of the matter, but directs the parties to be prepared, hence the judgment itself conferred no title. Raja Hanwant Singh, in the absence of formal documents, the agreement of September 1871 being merely a contract to convey property. He cited *Collector of Gorakhpur v. Palakdhari Singh* (1), in support of the view that the decree was inadmissible in evidence in the present case, being neither a 'transaction,' nor a 'fact,' within the meaning of section 13 of the Indian Evidence Act. He contended that Babu Lachman Singh, being no party to the contract of 1st September 1871, could not maintain a suit to enforce benefits which the contract might confer on him; that Raja Rampal Singh being the owner of the property, it is only by his act and contract duly registered that the property could be transferred; and that Raja Rampal Singh has done no such act, and that plaintiff therefore has no title to the property.

"With reference to respondent's argument that Raja Rampal Singh, by the deed of gift of 2nd April 1859, obtained an absolute title and that that title has remained unaffected by any subsequent transactions, it is urged for the appellants that the second Summary Settlement by itself gave no title on the 2nd April 1859, therefore Raja Hanwant Singh had no title which he could convey to Raja Rampal Singh. If he had a title, it could not be a Taluqdari title. The letter of the Government of India of 10th October 1859, and the *sanad* of 28th October 1859 did confer a title on Raja Hanwant Singh *Brij Indra Bahadur Singh v. Janki Kumhar* (2), was cited on this point. It is urged that Act I of 1869 again conferred title on Raja Hanwant Singh:—(See *Hur Parshad v. Sheo Dayal* (3); and that Raja Hanwant Singh held possession during the minority of Raja Rampal Singh. On the latter arriving at majority and disputes arising, Raja Hanwant Singh repudiated the title of Rampal Singh and sued the latter for a declaration of his title. If Raja Hanwant Singh had not a good title, his and Raja Rampal Singh's were at least doubtful rights forming a fit subject for a family arrangement. The case was settled by a family arrangement or compromise.

"Section 23 of Act I of 1877 lays down that 'except as otherwise provided by this chapter the specific performance of a contract may be obtained by, (a) where the contract is a settlement on marriage as a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder.' *Stapleton v. Stapleton* (4), is to a similar effect.

(1) (1889) I. L. R., 12 All., 1.  
(2) (1877) L. R., 5 I. A., 1 (12).

(3) (1876) I. L. R., 3 I. A., 259 (270).  
(4) (1789) 1 Atk. 2.

"Under section 98 of Act VIII of 1859 the duty of the Court was to dispose of the suit in accordance with the compromise. The compromise being entered *verbatim* in the judgment, the judgment is declaratory of the rights of the parties. The direction of the Court that further documents should be prepared was a mere superfluity, the decree under section 98 of Act VIII of 1859 being final and fixing the terms binding on the parties from the date of decree. On this point, I am of opinion that the decree and judgment of the Revenue Court of 1871 sufficiently prove the decision of the Court. The direction of the Court that further documents should be prepared was made in doubt *ex majore cautela* and was superfluous. The family arrangement entered into and confirmed by the Court was binding on Raja Rampal Singh. Raja Rampal Singh has approbated and derived benefits from that arrangement, and cannot now reprobate it. The compromise being a family arrangement, Bibu Lachman Singh, though not a party to it, could take an interest under that arrangement.

"With regard to the litigation of 1876 the learned advocate for Raja Rampal Singh urged that the present plaintiff, Lal Ram Prasad Singh, was not on the record in the suit of 1876. It is said that he claims under Babu Lachman Singh or Raja Hanwant Singh. He is no heir of Raja Hanwant Singh, the estate going by custom to the eldest son. He is the eldest son of Babu Lachman Singh, but it is alleged that mere relationship is insufficient. There must be privity of estate: see *Hukm Chand on Res Judicata*, page 184: and if that is the true rule, plaintiff must show that he takes inheritance as successor from Lachman Singh. Under clauses 5 and 7 of the agreement of 1st September 1871, Bibu Lachman Singh had only a contingent estate, and in the event of Raja Hanwant Singh surviving Babu Lachman Singh, the absolute estate would have vested in Raja Hanwant Singh. If thus, in 1876, at the time of the suit Bibu Lachman Singh had only a contingent interest, he had no heritable or transferable estate and nothing passed from Bibu Lachman Singh to the plaintiff on the death of the former, there being no privity of estate between them. The learned advocate cited *Bhagwanta v. Sukhi* (1), *Rudr Narain Singh v. Rup Kunwar* (2), and *Ram Narain v. Bishoshur Prasad* (3), as showing that there was no privity of estate between different reversioners to a Hindu holding a life estate.

"Dealing with the plaintiff appellant's contention that events which happened after 1876, *i.e.*, the death of Raja Hanwant Singh, had changed Babu Lachman Singh's contingent interest into a vested remainder, the learned advocate urged that under section 13 of the Code of Civil Procedure, in order to establish an estoppel, it is necessary that the parties should be litigating under the same title, that is necessary to see under what title Babu Lachman Singh was litigating in 1876, that the plaintiff cannot succeed unless the interest of Babu Lachman Singh vested in him from its inception in 1871, that the Court cannot consider any title acquired after the suit of 1876.

(1) (1899) I. L. R., 22 All., 33. (2) (1878) I. L. R., 1 All., 784.  
(3) (1888) I. L. R., 10 All., 411.

1904

RAMPAL  
SINGH  
v.  
RAM  
PRASAD  
SINGH.

1904

RAMPAL  
SINGH  
v.  
RAM  
PRASAD  
SINGH.

"In my opinion, there can be no doubt that plaintiff is claiming under Babu Lachman Singh within the meaning of section 13 of the Code of Civil Procedure. Babu Lachman Singh was a party to the litigation of 1876, the question directly and substantially in issue was whether he had a contingent or a vested interest under the compromise and decree of 1871. The Court substantially held that he had a vested remainder and could therefore sue to set aside an alienation. The present plaintiff is suing on the same vested interest as heir to his deceased father. He therefore claims under his father, and there is full privity of estate between the plaintiff and his father. It is immaterial whether the Court in 1876 was right or wrong in holding that Babu Lachman Singh had a vested remainder. The decision was conclusive between Raja Rampal Singh and Babu Lachman Singh. It is equally conclusive in favour of Babu Lachman Singh's son, who is litigating under the same title as his father. From the mere fact that Raja Hanwant Singh died after the decree of 1876 (though that fact might strengthen the plaintiff's case irrespective of his plea of *res judicata*) it does not follow that his plea of *res judicata* is thereby weakened, the plaintiff is still litigating under the same title as his father, who conclusively established it against the defendant by suit in 1876.

"The learned advocate further contends that the matter, now directly and substantially in issue, was not directly and substantially in issue in the suit of 1876, that though a person cannot sue alone to enforce a contract to which he is no party, he may join as a co-plaintiff in a suit brought by a party to the contract:—Pollock on Contracts, 3rd edition, 219. Inasmuch as Raja Hanwant Singh was a party to the suit in 1876, it was open to Babu Lachman Singh to come in as a co-plaintiff and hence it cannot be said that Raja Rampal Singh might and ought to have made that matter a ground of defence in 1876.

"He further urges that Raja Rampal Singh could not have pleaded the invalidity of the compromise of 1871 on the ground of want of registration in the suit of 1876, because under clause 9 of the compromise Raja Rampal Singh contracted not to transfer except under certain conditions. That compromise was embodied in the judgment of 1871 in the suit between Raja Hanwant Singh and Raja Rampal Singh and was *res judicata* between them. Raja Rampal Singh, therefore, could not have made that matter a ground of defence against Raja Hanwant Singh in 1876.

"The learned advocate contends that the suit of 1876 was based on a breach of contract; while the present claim is that the plaintiff has an absolute vested right. He contends that the terms of the judgment of 1876 are not clear, the term 'certain remainder-man' not being known to the law. The finding is only an *obiter dictum*; the judge in terms refused to make any declaration in favour of the plaintiff as claimed in the first relief. He cancelled the deed of gift, and refused to grant possession, the relief being based on breach of contract. Raja Hanwant Singh and Lachman Singh occupied the same position, Raja Hanwant Singh being allowed to sue as a contracting party and Babu Lachman Singh as a co-plaintiff, as held in *Gregory v. Williams* (1) quoted in Pollock on Contracts, 3rd edition, page 219.

(1) (1817) 3 Merivale, 582.



"It is contended that in the litigation of 1876, the plaintiff did not claim a vested remainder nor did the plaintiff plead such a right nor did the Court grant a declaration of such a right. Assuming that the Court in 1876 did hold that Babu Lachman Singh had a vested remainder, and that there had been a breach of contract, it is contended on *Shib Charan Lal v. Raghunath*, that the finding as to the breach of contract comes first in logical sequence, and that the finding as to the vested remainder is merely a corollary to this finding and is therefore not *res judicata*.

"The suggestion of the learned advocate that the Court in 1876 allowed Babu Lachman Singh to sue as a co-plaintiff on the principle of *Gregory v. Williams* (2) seems to me to be opposed to the proceedings and judgment of the Court. The argument now raised nowhere appears throughout the proceedings in that case. Babu Lachman Singh claimed to have an interest under the compromise of 1871, which entitled him to have an alienation by Raja Rampal Singh set aside. It was pleaded that his right to sue would not accrue until the deaths of certain persons. The judgment of the Court plainly shows that the question before it was, whether Babu Lachman Singh had a contingent interest only or a vested remainder. The Court held that he had a vested remainder and could maintain the suit.

"If the present contention of the learned advocate is correct that Raja Rampal Singh has been Taluqdar from the date of the deed of gift of 1859 and that the decree of 1871 and the subsequent transaction have not altered his status as absolute owner, and that Babu Lachman Singh had no interest in the decree of 1871 and could institute no suit with regard to Raja Rampal Singh's dealing with the property, those matters might and ought to have been made ground of defence in the suit of 1876. They would, if established, have defeated the claim of Babu Lachman Singh. These matters were not put forward in that case. The Court heard and decided in that case that Raja Rampal Singh was not an absolute proprietor and that he had only a life-interest in the estate. I hold that under explanation II, section 13, of the Code of Civil Procedure, these matters must be deemed to have been matters directly and substantially in issue in the suit of 1876.

"The respondent, Basant Singh, defended the case on the same grounds as Raja Rampal Singh.

"I hold that the judgment of the Civil Court in 1876 is conclusive between the parties to the present suit and establishes the fact that Raja Rampal Singh has a life-interest only in mauza Parbara with remainder to the plaintiff. It is unnecessary to decide whether, irrespective of the plea of *res judicata*, the plaintiff has established his case. The question involves only matters of law."

On this appeal.

Mr. C. W. Arathoon for the appellant contended that it had been wrongly decided by the Judicial Commissioners that the decision of the Deputy Commissioner of 31st October 1876

1904

RAMPAL  
SINGH  
v.  
RAM  
PRASAD  
SINGH.

(1) (1895) I. L. R., 17 All., 174. (2) (1817) 3 Merivale, 582.

1904

RAMPAL  
SINGH  
v.  
RAM  
PRASAD  
SINGH.

constituted a *res judicata* between the parties in this suit. In the suit of 1876 Lachman Singh was not suing on the same title as the plaintiff in the present suit, who was not a party nor claiming through a party to that suit, nor was the issue as to the interest of Rampal Singh in the property in dispute substantially raised in the former suit. The substantial issue there was whether there had been a breach of the compromise of 1871, and the case of *Kattama Natchiar v. Dorasingu Tenar* (1), which related to a claim to future inheritance was held not to be applicable. [SIR ARTHUR WILSON. It was not contended in the suit of 1876 that the compromise of 1871 was not binding: was not that a point which you might and ought to have taken, but omitted to take, within the meaning of explanation II of section 13 of the Civil Procedure Code?] It was not a point "directly and substantially in issue in the former suit." Reference was made to *Shib Charan Lal v. Raghunath* (2). The compromise, moreover, of 1871 never was a binding agreement. In the first place it was not registered and therefore not valid under the Registration Act, nor under the Oudh Estates Act (I of 1869), section 13 of which provides that, unless in certain cases, of which this was not one, a taluqdar had no power to give or bequeath his estate except by an instrument duly registered in accordance with that Act. In the second place the compromise of 1871 was not intended to be final. No relief was given by the decree on it, and that decree directed that each party should "within two months draw up a formal agreement embodying the terms of the compromise." Something further, therefore, (which was never done) was necessary to complete the agreement and make it final. The respondent, moreover, was not a party to it, and therefore could not derive any benefit under it. The appellant, on the other hand, had acquired an absolute title in the estate in suit under the deed of gift of 2nd April 1859, which title, as had been, it was submitted, rightly held by the Subordinate Judge, had never been disturbed.

Mr. De Gruyther for the respondents contended that the decision in the suit of 1876 was a *res judicata* in the present

(1) (1875) 15 B. L. R., 83 (108):  
L. R., 2 I. A., 299.

(2) (1895) I. L. R., 17 All., 174.

suit. That decision finally determined that the appellant had only a life-interest in the taluqdari estate. That was the substantial issue in the suit, the validity of the compromise of 1871 not being then in issue. The contention that it was invalid, should, if relied on, have been raised in the suit of 1876. Not having been raised it was now *res judicata*. *Kameswar Pershad v. Rijkumari Ruttan Koer* (1). The rights of the parties to the present suit were, it was submitted, governed by the compromise of 1871: the appellant had acted on that compromise and had derived benefit under it: the petition to the Court of the parties to that compromise was "that the agreement may be recorded and the suit be disposed of in accordance therewith:" the appellant was now, therefore, estopped from disputing its validity, for which registration was not necessary; and it was not invalid by reason of section 13 of Act I of 1869 which only applied to transfers by gift or bequest." As to the order of the Court that further documents were to be filed and that the intention was that the compromise was not to be final until that had been done, a formal agreement was filed by Hanwant Singh on 30th October 1871, and one was signed by Rampal Singh on 26th February 1874, but it was not in the record in this suit. The appellant did not acquire an absolute title under the deed of gift of 2nd April 1859: that was superseded by the *sanad* granted to Hanwant Singh on 28th October 1859, and from that time, and therefore in 1871 when the compromise was made, Hanwant Singh was the taluqdar of the estate. For these reasons the decision of the Judicial Commissioners should, it was submitted, be upheld.

Mr. Arathoon replied.

1904, November 11th.—The judgment of their Lordships was delivered by SIR ARTHUR WILSON :—

The suit out of which this appeal arises relates to lands forming part of the estate Rampur Kaithoula, a taluqa governed by the Oudh Estates Act, I of 1869.

The taluqdar of Rampur Kaithoula was formerly Raja Hanwant Singh, with whom the second Summary Settlement was made, and to whom a taluqdari *sanad* was granted in

(1) (1892) L. R., 19 I. A., 234 (238); I. L. R., 20 Calc., 79 (85).

1904

RAMPAL  
SINGH  
v.  
RAM  
PRASAD  
SINGH.

1904

RAMPAL  
SINGHv.  
RAM  
PRASAD  
SINGH.

October 1859. His name was entered in the first and second lists under section 8 of the Oudh Estates Act.

Raja Hanwant Singh had two sons, Partab Singh, the elder, and Lachman Singh, the younger. Partab died before April 1859, leaving a widow, Dirgaj Kunwar, and a son Raja Rampal Singh. Lachman, the younger son of Raja Hanwant, survived his father.

On the 2nd April 1859 Raja Hanwant Singh, after the death of his elder son, Partab Singh, executed a deed of gift, registered in due course, by which he purported to convey to Partab's son, Raja Rampal Singh, the whole estate of Rampur Kaithoula, with the exception of six villages, which were to go to Raja Hanwant Singh's younger son, Lachman.

Differences afterwards arose between Raja Hanwant Singh and his grandson, Raja Rampal, and the former brought a suit against the latter in 1871, in which Raja Hanwant sought a declaration that, notwithstanding the deed of gift of 1859, the proprietary right in Rampur Kaithoula, and the power to dispose of it by will, were vested in him. That suit was settled by a compromise expressed in a petition of the parties; and on the 7th September 1871 a decree was passed accordingly which embodied the terms of the compromise. As to those terms it is enough to say that, according to them, various portions of the estate were to be held for a series of life estates by Raja Hanwant Singh, Raja Rampal Singh, and the mother of the latter, Rani Dirgaj Kunwar, and that after the expiration of those three lives Lachman Singh, the second son of Raja Hanwant Singh, was to succeed to the whole taluqa. The compromise further contained a clause empowering Raja Rampal by will or deed to give lands absolutely amongst his widows or children, with a limit of value, and subject to other restrictions. It should be observed that to these proceedings Lachman Singh was not a party.

In 1873 Raja Rampal Singh executed and registered a deed in favour of his wife Subhao Kunwar conveying to her certain villages forming part of the taluqa Rampur Kaithoula. In 1876 Raja Hanwant Singh and his son Lachman Singh filed a suit in the Court of the Deputy Commissioner of Partabgarh

against Raja Rampal Singh and his wife, asking for cancellation of the last-mentioned deed, and to displace the possession of the second defendant under it.

That suit was defended on various grounds, amongst which it is enough to notice that the then defendants asserted the complete validity of the gifts impugned, and explicitly alleged that Lachman Singh had no such interest in the property as to entitle him to sue. And issues were raised upon these points. The Deputy Commissioner by his judgment in that suit held, with regard to Lachman Singh, that he was "a certain remainder-man, under the terms of the agreement," that he "or his representatives will certainly inherit the estate some time or other," and that "if cause of action be found to have accrued to plaintiff Raja Hanwant Singh, it will also have accrued to Babu Lachman Singh." And as to Raja Hanwant Singh it was held that the alienation impugned was void as against him, on the ground that it was in excess of the power reserved to Raja Rampal Singh in the compromise of 1871. On the other hand, it was held that Raja Rampal Singh could alienate for his own life. The decree that followed declared the gift in question to be "null, void, and of no effect whatsoever, either as authorizing the Rani's present possession or as regards the devolution of the villages specified in it after her death;" while it went on to say that no right had yet accrued to plaintiffs to disturb her possession.

Raja Hanwant Singh died in 1881, Rani Dirgaj Kunwar, the mother of Raja Rampal, in 1882, and Lachman Singh in 1888.

In 1889 a fresh controversy arose. Messrs. Eyre and Spottiswoode having obtained a decree against Raja Rampal Singh proceeded to execute it by attachment and sale of mauza Parbara, a village included in the taluqa Rampur Kaithoula, and the mauza was sold, without limitation of title, to Basant Singh. Thereupon Ram Prasad Singh, the son and heir of Lachman Singh, brought the present suit, on the 24th March 1896, in the Court of the Subordinate Judge of Partabgarh, against Raja Rampal Singh, Basant Singh, and Messrs. Eyre and Spottiswoode. The plaintiff relied upon the settlement under

1904

RAMPAL  
SINGH  
v.  
RAM  
PRASAD  
SINGH.



1904

RAMPAL  
SINGH  
v.  
RAM  
PRASAD  
SINGH.

the compromise and decree of 1871, and asked for a decree declaring that he was entitled, as immediate reversioner, to the absolute estate in mauza Parbara after the death of Raja Rampal Singh; and that the sale in execution of that mauza would be inoperative against him after the death of the Raja. The principal defendant, Raja Rampal Singh (whom alone it is necessary to consider) set up in answer to the suit a case to the effect that he had an absolute title by virtue of the deed of gift of 1859, and that for various reasons the compromise of 1871 and the decree embodying it were not effective to displace that title as between him and the plaintiff in this suit.

At the hearing the plaintiff relied upon the decree of 1876 as having established, as between the defendant Raja Rampal Singh and Lachman Singh (the father and predecessor in title of the plaintiff), that the Raja had only a life-interest in the estate, and that Lachman Singh (and therefore also the plaintiff as his heir) had a vested estate in remainder.

The Subordinate Judge held that the decree of 1876 did not operate as *res judicata* in respect of the matters in question in this suit, and finding in favour of the defendants on other points dismissed the suit.

On appeal to the Court of the Judicial Commissioner the learned Judges of that Court differed from the first Court on the question of *res judicata*, holding that the decision of the Court in 1876 was conclusive of the present case. Their reasons for so holding are thus stated:—"There can be no doubt that plaintiff is claiming under Babu Lachman Singh within the meaning of section 13 of the Code of Civil Procedure. Babu Lachman Singh was a party to the litigation of 1876, the question directly and substantially in issue was whether he had a contingent or vested interest under the compromise and decree of 1871. The Court substantially held that he had a vested remainder and could therefore sue to set aside an alienation;" and "the judgment of the Civil Court in 1876 is conclusive between the parties to the present suit and establishes the fact that Raja Rampal Singh has a life-interest only in mauza Parbara, with remainder to the plaintiff. It is unnecessary to decide whether irrespective of the plea of *res judicata* the

plaintiff has established his case. The question involves only matters of law." The learned Judges accordingly set aside the decree appealed against and made a decree in favour of the plaintiff. Against that decision the present appeal has been brought by the defendant Raja Rampal Singh, the respondents being the representatives of the plaintiff.

Their Lordships agree with the learned Judicial Commissioners as to the effect of the decree of 1876; and they think it unnecessary to add anything to the reasons so clearly stated by those learned Judges.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the costs.

*Appeal dismissed.*

Solicitors for the appellant: Messrs. T. L. Wilson and Co.

Solicitors for the respondents: Messrs. Watkins and Lempriere.

J. V. W.

## APPELLATE CIVIL.

1904

June 2.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.*

SHEO DAT AND OTHERS (PLAINTIFFS) v. SHEO SHANKAR SINGH

AND OTHERS (DEFENDANTS).\*

*Act No. I of 1877 (Specific Relief Act) section 21—Civil Procedure Code, section 523—Arbitration—Agreement to refer made pending a suit—Such agreement a bar to the continuance of the suit.*

Where parties to a suit have agreed to refer the matters in dispute between them in such suit to arbitration, such an agreement ousts the jurisdiction of the Court to proceed with the suit, whether it is filed in Court under the provisions of section 523 of the Code of Civil Procedure or not. *Salig Ram v. Jhunna Kuar* (1), *Sheoambar v. Deodat* (2) and *Shib Lal v. Hira Lal* (3) followed.

In a suit for pre-emption, after service of summons on the defendants, the parties agreed to refer the matters in dispute between them to arbitration and an arbitration agreement was drawn up and signed. Notwithstanding this agreement, the suit came on for hearing. The Court (Officiating Subordinate

\* Appeal No. 3 of 1904 under section 10 of the Letters Patent.

(1) (1882) I. L. R., 4 All., 546. (2) (1886) I. L. R., 9 All., 168.

(3) Weekly Notes, 1888, p. 188.

1904

SHRO DAT  
v.  
SHRO  
SHANKAR  
SINGH.

Judge of Gorakhpur), in the absence of evidence to establish the agreement, was not satisfied that any such agreement existed and proceeded to determine the suit on the merits. The defendants appealed. The lower appellate Court (District Judge of Gorakhpur) remanded an issue to the Court of first instance for a finding as to whether the agreement to refer had in fact been executed or not. The finding returned was that it had been executed, and with this finding the District Judge agreed. He did not, however, consider it a bar to the hearing of the appeal, which he proceeded with, ultimately passing a decree for pre-emption in favour of the plaintiffs. The defendants appealed to the High Court, when the single Judge of the Court, before whom the appeal came in for hearing, came to the conclusion that the agreement to refer was a bar to the suit, and accordingly decreed the appeal and dismissed the plaintiff's suit (1). From this judgment the plaintiffs appealed under section 10 of the Letters Patent.

Munshi Gobind Prasad, for the appellants.

Munshi Gokul Prasad, for the respondents.

STANLEY, C.J., and BURKITT, J.—The question raised in this appeal is not a novel one. It has been the subject of consideration by three Benches at least of this High Court. The suit out of which the appeal has arisen was brought by the plaintiffs for pre-emption. After the service of summons on the defendants the parties agreed to refer the matter to arbitration and an arbitration agreement was drawn up and signed. Notwithstanding this agreement the case came on for hearing before the Court of first instance, when, in the absence of evidence to establish the agreement, the Court was not satisfied that any such agreement existed and proceeded to determine the suit on the merits. On appeal the lower appellate Court being dissatisfied with the refusal of the Court of first instance to allow time to one of the parties to prove the agreement, remanded an issue, under section 566 of the Code of Civil Procedure, to the Court of first instance for determination. The issue was whether or not a valid agreement to refer to arbitration had been executed. This issue was found in the affirmative, and

(1) Weekly Notes, 1904, p. 9.

the learned District Judge approved of the finding. The District Judge, however, came to the conclusion that the agreement to refer the matter in dispute to arbitration was not a bar to the further prosecution of the suit. He therefore considered the evidence and decided the suit on the merits, giving a decree to the plaintiffs for pre-emption. On appeal to this High Court our brother Blair came to the conclusion that the agreement was a bar to the suit, and dismissed the suit with costs in all Courts. From his decree the present appeal has been preferred under section 10 of the Letters Patent.

The contention of the appellants before us is that section 21 of the Specific Relief Act only applies to agreements entered into before suit and does not apply to an agreement, such as the present, which was entered into pending the suit. The argument advanced on behalf of the respondents is that section 523 of the Code of Civil Procedure applies as well to a case in which a reference to arbitration has been made pending the suit as to a reference made before any litigation has been instituted. This question has, as we have said, been the subject of consideration by this High Court. In the case of *Salig Ram v. Jhunna Kuar* (1), Sir Robert Stuart, C.J., and Tyrrell, J., held on appeal that where the parties to a suit had agreed to refer the matters in difference between them in such suit to arbitrators, the further hearing of the suit was rightly held to have been barred under section 21 of the Specific Relief Act. This decision was followed in the latter case of *Sheoamber v. Deodat* (2), by Sir John Edge, C.J., and Tyrrell, J., and by the same Judges again in the case of *Shib Lal v. Hira Lal* (3). We see no reason for differing from the decision at which they arrived. It appears to us that, having regard to the sections of the Code of Civil Procedure, dealing with the subject of arbitration, section 523 was intended to have effect in a case such as the present. Section 506 and the following sections, up to section 522, deal with cases in which the parties to a suit desire to leave the matters in difference between them to arbitration and apply to the Court for an order of reference. Those are

1904

SHRO DAT  
v.  
SHRO  
SHANKAR  
SINGH.

(1) (1882) I. L. R., 4 All., 546. (2) (1886) I. L. R., 9 All., 168.  
(3) *Weekly Notes*, 1888, pp. 133.

1904

SHEO DAT  
v.  
SHEO  
SHANKAR  
SINGH.

not cases like the present. In such cases there are provisions for all the necessary steps following upon an order of reference by the Court. But section 523 refers to cases in which persons, whether they be litigants or not, themselves agree, independently of the Court, to refer the matters in difference between them to arbitration, and ask the Court to have the agreement filed; then section 525 enables parties who have agreed to refer their differences to arbitration and have obtained an award to have that award filed in Court. The course which the appellants in the present case ought to have taken is that provided by section 523. They omitted to follow that course, and, despite the fact that they had agreed to refer the dispute to arbitration, proceeded to carry on the litigation. We think it would be most inconvenient if two simultaneous proceedings in respect of disputes were allowed, namely, arbitration proceedings and proceedings before a Court of Justice. We think, therefore, the decision arrived at by our learned colleague was correct, and we dismiss the appeal with costs.

*Appeal dismissed.*

1904  
June 8.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkill.*

HAR PRASAD (PLAINTIFF) v. JAGAN LAL AND ANOTHER  
(DEFENDANTS).\*

*Civil Procedure Code, section 285—Execution of decree—Sale by Court of lower grade of property attached by a Court of higher grade—Sale invalid.*

Where the same property is under attachment by two Courts of different grades, a sale effected by the Court of lower grade is a nullity, whether such sale was effected in ignorance of the attachment imposed by the Court of higher grade or not, and consequently a purchaser at such sale has no *locus standi* to sue for a declaration that a subsequent sale held in pursuance of the attachment imposed by the Court of higher grade is not valid. *Chiranjil Lal v. Jawahir Mal* (1) followed.

In this case one Indar Sahai, on the 11th of December 1894, obtained a simple money decree against Banke Rai. The decree was transferred to the Court of the Munsif of

\* Second Appeal No. 273 of 1903 from a decree of W. R. G. Moir, Esq., Additional District Judge of Moradabad, dated the 1st of December 1902, confirming a decree of Bibu Pramatha Nath Banerji, Subordinate Judge of Moradabad, dated the 11th of June 1902.

(1) Weekly Notes, 1904, p. 95.



Bijnor for execution, and on the 12th of February 1898, a house belonging to the judgment-debtor was attached by that Court. On the 1st of May 1898 another creditor of Banke Rai, Karim-ud-din, obtained a simple money decree against Banke Rai, and that decree was transferred for execution to the Subordinate Judge of Moradabad, who exercised jurisdiction in the Bijnor district, and on the 2nd of April 1898 the same house which had been attached by the Munsif of Bijnor in execution of Indar Sahai's decree was again attached by the Subordinate Judge of Moradabad. On the 6th of June 1898, the house was put up for sale by the Munsif and was purchased by one Har Prasad. On the 13th of October 1901, Karim-ud-din transferred his decree to Jagan Lal, who, on the 14th of October 1901 applied to the Subordinate Judge to substitute his name for that of the original decree-holder and to proceed with the execution thereof. This application was granted. Thereupon Har Prasad intervened and filed an objection to the execution of the decree. This objection was overruled and the house was again sold, and an appeal filed by the objector was rejected. Har Prasad accordingly instituted the present suit for a declaration that the sale of the house in question under the defendant Jagan Lal's decree was not a valid sale. The Court of first instance (Subordinate Judge of Moradabad) dismissed the suit, and the District Judge confirmed this decree. The plaintiff thereupon appealed to the High Court.

Pandit *Sundar Lal*, for the appellant.

Pandit *Moti Lal Nehru* and Munshi *Gobind Prasad* for the respondents.

STANLEY, C. J., and BURKITT, J.—The initial difficulty which meets the appellant at the threshold of this case is that he has no *locus standi*, the sale to him in respect of which he claims to be entitled to maintain the present suit having been made by a Court which had no jurisdiction to sell having regard to the provisions of section 285 of the Code of Civil Procedure. It appears that one Banke Rai was the owner of a house which is the subject-matter of the litigation. One of his creditors, Indar Sahai, obtained a simple money decree

1904

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HAR  
PRASAD  
v.  
JAGAN  
LAL.

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1904

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HAR  
PRASAD  
v.  
JAGAN  
LAL.

against him on the 11th of December 1894. That decree was transferred for execution to the Munsif of Bijnor, and on the 12th of February 1898, the said house was attached by the Munsif. On the 1st of May 1898, Karim-ud-din also obtained a simple money decree against Banke Rai, and that decree was transferred for execution to the Subordinate Judge of Moradabad, who exercised jurisdiction in the Bijnor district, and on the 2nd of April 1898, the house in question was attached. Now under section 285 of the Code of Civil Procedure, where the same property has been attached by two Courts of different grades, the Court which has jurisdiction to receive or realise the property so attached, or to determine any claim thereto or any objection to the attachment is the Court of the highest grade. Consequently the Court which alone could realise the decrees obtained against Banke Rai, in this case was the Court of the Subordinate Judge of Moradabad. Notwithstanding this, possibly in ignorance of the fact that the house had been attached by the Subordinate Judge of Moradabad, the Munsif on the 6th of June 1898, put it up for sale and sold it to the plaintiff Har Prasad for a sum of Rs. 856. On the 13th of October 1901, Karim-ud-din transferred his decree to the defendant Jagan Lal, who, on the 14th of October of the same year, applied to the Subordinate Judge of Moradabad for substitution of his name as decree-holder and for carrying on of the execution proceedings. The application was granted. On the 21st of January 1902, Har Prasad appeared in these execution proceedings and filed an objection to the execution of the decree, but his objection was overruled on the 3rd of February 1902, and on the 7th of the same month the house was sold to Musammat Shiam Dei. The plaintiff appealed against the order of the 3rd of February 1902, rejecting his application, but that appeal was rejected on the 7th of June 1902, on the ground that no appeal lay. Hence the present suit was instituted.

In his claim the plaintiff asks for a declaration that Jagan Lal, the transferee of the decree of Karim-ud-din, was not entitled to bring to sale the house under Karim-ud-din's decree. Now, according to the authorities in this Court to the latest

of which we may refer, namely, the case of *Chiranji Lal v. Jawahir Mal* (1) the sale carried out in the Munsif's Court was made without jurisdiction, and that whether or not that Court carried out the sale in ignorance of the attachment imposed by the Court of higher grade, *viz.*, the Subordinate Judge of Moradabad. The section in providing that the Court entitled to exercise jurisdiction in such a case shall be the Court of the higher grade, deprives the lower Court of any authority or jurisdiction to sell. This being so, the sale to the plaintiff was a nullity and no interest in the property passed thereunder to him. This being so, he is not in a position to maintain the present suit. The assignee of Karim-ud-din's decree is entitled to realise the amount of that decree in the manner provided by law. This being our view the dismissal of the suit by the lower Courts cannot be assailed. We therefore dismiss the appeal with costs.

*Appeal dismissed.*

1904

HAIR  
PRASAD  
v.  
JAGAN  
LAL.

*Before Mr. Justice Knox and Mr. Justice Aikman.*

MALHI KUNWAR AND OTHERS (DEFENDANTS) v. IMAM-UD-DIN  
(PLAINTIFF).\*

1904  
June 6.

*Civil Procedure Code, section 13—Res judicata—Pro forma defendant.*

The plaintiff sued Nathu Mal and Mathri to recover possession of certain mortgaged property alleging that the mortgage had been discharged by payment of half the amount due to the persons whom he made defendants and half to Malhi Kunwar and others as representatives of one Mitter Sen. The defendants, 1st party, pleaded that they were entitled to the whole of the mortgage money, and that payment of one-half to the representatives of Mitter Sen was no payment as against them. Malhi Kunwar and others were made defendants to the suit, and in the end it was held that the defendants, 1st party, were entitled to the whole of the mortgage money, and a decree was passed in favour of the plaintiff on payment of Rs. 997 to Nathu Mal and Mathri. The Court in that suit exempted the defendants Malhi Kunwar and others, holding that they had no interest in the property in suit. Subsequently the plaintiff sued Malhi Kunwar and others to recover from them the money paid on account of the mortgage. *Held* that the decision in the former suit did not render the question of payment to the present defendants *res judicata*. *Brajo Behari Mitter v. Kedar Nath Mozumdar* (2) followed.

\* Second Appeal No. 224 of 1903 from a decree of A Yusuf Ali, Esq., Additional Judge of Saharanpur, dated the 12th December 1902, reversing a decree of Bibu Madho Das, Subordinate Judge of Saharanpur, dated the 29th of July 1902.

(1) Weekly Notes, 1904, p. 95. (2) (1886) 1. L. R., 12 Calc., 580.

1904

MALHI  
KUNWAR  
v.  
IMAM-UD-  
DIN.

THIS was a suit to recover Rs. 900 with interest under the following circumstances. In a former suit the plaintiff sought to recover possession of certain mortgaged property on the allegation that the mortgage had been discharged by payment of the mortgage money, half to the defendants in that suit, Nathu Mal and Mathri, and half to Malhi Kunwar and others. In that suit Malhi Kunwar and others were made defendants under section 32 of the Code of Civil Procedure in order to comply with the provisions of section 85 of the Transfer of Property Act. The result of the suit was that a decree was passed in favour of the plaintiff on the condition of his paying the other half of the mortgage money to Nathu Mal and Mathri, and it was found that the added defendants had no interest in the mortgaged property. Thereupon the plaintiff filed the present suit against Malhi Kunwar and others, in which he sought to recover from them the money which he had been obliged to pay by the decree in the former suit. The Court of first instance (Subordinate Judge of Saharanpur) dismissed the suit. The plaintiff appealed to the District Judge, who held that the decision in the former suit rendered the question now in dispute between the parties *res judicata*, and accordingly reversed the decision of the Subordinate Judge and decreed the major portion of the plaintiff's claim. The defendants appealed to the High Court.

Pandit Moti Lal Nehru, for the appellants.

Babu Jogindro Nath Chaudhri, for the respondent.

KNOX and AIKMAN, JJ.—The sole question we have to consider in this appeal is whether the learned Judge of the lower appellate Court has erred in law in holding that the question at issue between the parties to this suit is *res judicata* by reason of a decision obtained on the 9th of December 1901 in a former suit brought by the plaintiff against Nathu Mal and Musammat Mathri to recover possession of mortgaged property.

The plaintiff's case in that suit was that the mortgage had been discharged by payment of one-half of the mortgage money to Nathu Mal and Musammat Mathri, and the other half to the present appellants, the representatives of one Mitter Sen. Nathu Mal and Musammat Mathri pleaded that they were

entitled to receive the whole of the mortgage money, and that the payment of half of it to the representatives of Mitter Sen was of no effect. The previous suit was instituted on the 28th of December 1900. On the 26th of August 1901, after issues had been framed, the present appellants were made parties to the suit as defendants, but no relief was asked against them, and indeed no relief could have been prayed for as the plaintiff and the added defendants were not at issue upon any point. In the result the Officiating Subordinate Judge decided that Nathu Mal and Mathri were entitled to the whole of the money, and gave the plaintiff a decree on payment of Rs. 997 to Nathu Mal and Mathri. In his judgment he went on to say that the other defendants, the present appellants "appear to have no interest in the property in dispute and they are accordingly exempted from the plaintiff's claim in this case." The plaintiff has now brought this suit to recover from the appellants the money he paid them on account of the mortgage. The Court of first instance dismissed the suit. On appeal, the learned Judge without entering into the merits of the case decreed the plaintiff's claim on the strength of what took place in the previous suit. It is quite clear from the judgment in that suit that the present appellants could have had no right of appeal against that decision, and it would be an extraordinary thing to hold that where a party to a suit has no right of appeal the decision in that suit should operate as *res judicata* against him. We consider the case before us as very much on all fours with the decision of the Full Bench of the Calcutta High Court in *Brojo Behari v. Kedar Nath* (1). As in that case, so in this, the matter now in issue was also in issue and was formally determined in the previous suit, but that issue was not an issue between the same parties or between parties under whom the parties in this suit claim. As we have already said, there was in the former suit no matter in issue between the parties to the present suit. The previous decision cannot therefore operate as *res judicata* in the present suit. For these reasons we allow the appeal; and setting aside the decree of the lower appellate Court, remand the case

1904

MATHRI  
KUNWAR  
v.  
IMAM-UD-  
DIN.

(1) (1886) I. L. R., 12 Calc., 580.



1904

MALHI  
KUNWAR  
P.  
IMAM-UD-  
DIN.

to that Court with directions to readmit the appeal under its original number in the register and dispose of it on the merits. The appellants are entitled to the costs of this appeal in any event. Other costs will abide the result. The objection under section 561 fails and is dismissed.

*Appeal decreed and cause remanded.*

1904

June 10.

## FULL BENCH.

*Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Knox, and  
Mr. Justice Burdett.*

BALDEO PRASAD (DEFENDANT) v. FAKHR-UD-DIN (PLAINTIFF) AND  
OTHERS (DEFENDANTS).\*

*Execution of decree—Sale of property not included in the decree—Sale confirmed without objection on part of judgment-debtor—Private sale by heirs of judgment-debtor to a third party—Rights of purchasers inter se.*

In execution of a decree for sale on a mortgage the interest of the judgment-debtor in the whole of certain property instead of in half only, which was all that was mortgaged, was sold. The sale was confirmed, possession was delivered and mutation proceedings took place in favour of the purchaser. The judgment-debtor, though having full knowledge of these proceedings, took no objection, but allowed the purchaser's name to be recorded in respect of the whole property. Subsequently the heirs of the judgment-debtor sold half of the property in question to one F, who brought a suit to recover possession thereof from the auction purchaser. *Held* that inasmuch as F, if he had made any sort of inquiry, would have become aware of the true state of the title to the property which he was purchasing, he could not be regarded as a *bona fide* purchaser, and was not in equity entitled to succeed as against the auction purchaser.

THE facts of this case are as follows:—

One Pahalwan Singh, who owned a 5-anna 4-pie share in a certain village, mortgaged half of it to one Ganeshi Lal on the 31st of October 1890. The mortgagee brought a suit on his mortgage, and obtained a decree for sale of the mortgaged share on the 17th of December 1894. That decree was transferred for execution to the Collector, and owing to some mistake or oversight the entire 5-anna 4-pie share, which had by that time been

\* Second Appeal No. 374 of 1902, from a decree of Babu Nil Madhab Roy, Judge of the Court of Small Causes, exercising powers of Subordinate Judge, at Cawnpore, dated the 18th of February 1902, reversing a decree of Pandit Kanhaiya Lal, Munsif of Cawnpore, dated the 28th of June 1901.

made into a separate mahal and was described as a 16-anna share, was put up for sale and sold to Baldeo Prasad, who is a stranger to the parties, on the 20th of May 1897, and on the 30th of June following the sale was confirmed in the presence of the parties, that is, in the presence of the judgment-debtor and the decree-holder, and a certificate of sale was granted to the purchaser on the 2nd of September 1897. No objection was taken to the sale, and on the 19th of September 1897 the auction purchaser was put into possession, and he subsequently obtained mutation of names in his favour, no objection again being raised in the course of the mutation proceedings, which were concluded on the 25th of November 1897. On the 10th of June 1898 the heirs of the original judgment-debtor sold a 2-anna 8-pie share out of the property purchased by Baldeo Prasad to one Fakhr-ud-din, and he filed the suit out of which this appeal has arisen in order to recover possession. The Court of first instance (Munsif of Cawnpore) dismissed the suit. On appeal by the plaintiff the lower appellate Court (Small Cause Court Judge with powers of a Subordinate Judge) decreed the appeal and the suit. The defendant auction purchaser thereupon appealed to the High Court.

Pandit *Sundar Lal* (with whom Pandit *Moti Lal Nehru*), for the appellant, contended that the plaintiff's vendors were estopped from denying the auction purchaser's title. They stood by at the time of the sale and took no objection to it. They did not even apply under section 311 of the Code of Civil Procedure to have the sale set aside. The sale was confirmed, and the purchaser obtained a sale certificate. The defendant appellant is a *bond fide* purchaser for value, and the plaintiff's vendors have obtained the benefit of the sale price paid by him. One main difficulty in the plaintiff's way is that he has not offered to refund the proportionate price for the property in dispute. A *bond fide* purchaser cannot be dispossessed of the property purchased, even if the decree under which he purchased be set aside in appeal: *Zain-ul-abdin v. Muhammad Ashgar* (1). The plaintiff's vendors were made parties to the proceedings in execution which resulted in the sale of the property. The

1904

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BALDEO  
PRASAD  
v.  
FAKHR-UD-  
DIN.

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1904

BALDEO  
PRASAD  
v.  
FAKHR-UD-  
DIN.

claim is, therefore, barred by the provisions of sections 244 and 316 of the Code of Civil Procedure. The cases relied on by the Subordinate Judge do not apply.

Maulvi *Ghulam Muftaba* for the respondent. The point is whether the sale of the excess share was not void in its inception. The decree was transferred to the Collector for execution under section 320 of the Code of Civil Procedure. He could sell only what had been ordered to be sold by the Civil Court, viz., a 2-anna 8-pie share. There was no occasion for the judgment-debtor to come forward and object to the sale of the additional 2-anna 8-pie share. Under Rule 17, Clause 12, Circular No. 24, Department II, the only ground upon which he could apply to have the sale set aside was material irregularity. But this was more than an irregularity. The Collector had no jurisdiction to sell more than the decree provided for the sale of, and we are entitled to ignore the sale *quoad ultra* altogether. Article 12 of the second schedule to the Indian Limitation Act, 1877, does not apply. A conditional decree may be passed in the plaintiff's, respondent's, favour, subject to his paying Rs. 725, the price paid for the property by the defendant-appellant. In order to establish that there was any act or omission binding on the plaintiff, it ought to be shown that he knew that his rights were affected by the sale. Why should he assume that the Collector would go out of his way and sell a larger share than he was empowered under the decree to sell?

The following cases were referred to:—*Nazar Ali v. Kedar Nath* (1), *Ram Chandra v. Kondo* (2), and *Balwant Rao v. Muhammad Husain* (3).

STANLEY, C.J., KNOX and BURKITT, JJ.—The facts of this appeal are very simple. One Pahalwan Singh, who owned a 5-anna 4-pie share in a certain village, mortgaged the half of it to one Ganeshi Lal on the 31st of October 1890. The mortgagee brought a suit on foot of the mortgage, and obtained a decree for sale of the share which was included in the mortgage on the 17th of December 1894. That decree was transferred for execution to the Collector, and owing to some

(1) (1897) I. L. R., 19 All., 308. (2) (1900) I. L. R., 22 All., 442.  
(3) (1893) I. L. R., 15 All., 324.

mistake or oversight the entire 5-anna 4-pie share, which had previously been changed into a separate mahal and was described as a 16-anna share, was put up for sale and sold to Baldeo Prasad, who is a stranger to the parties, on the 20th of May 1897, and on the 30th of June following the sale was confirmed in the presence of the parties, that is, in the presence of the judgment-debtors and the decree-holder, and a certificate of sale was granted to the purchaser on the 2nd of September 1897. Now it is no doubt the case that the Collector had no jurisdiction to sell a moiety of the property which was included in the sale. He could only sell the property which was ordered to be sold, that is, the share which was comprised in the mortgage. A sale of property outside of that property must be treated as a nullity. However, no objection was taken by any of the parties to the sale, and on the 19th of September 1897 possession was given to the purchaser. Following upon the sale the usual *dakhil-kharij* proceedings took place, when notice must have been given in the ordinary course to the judgment-debtors, who, we should mention, were the representatives of the original mortgagor, and no objection whatever was raised by them to the mutation of names, which was applied for by the purchaser, and was effected on the 25th of November 1897. The heirs of Pahalwan Singh, notwithstanding the sale to Baldeo Prasad and with full knowledge of all the circumstances, sold the 2-anna 8-pie share which had been included in the sale by the Collector to Baldeo Prasad to the present plaintiff-respondent Hafiz Fakhr-ud-din on the 10th of June 1898, and he has brought the present suit to recover possession from Baldeo Prasad of the property so sold to him. Now it is clear that if Hafiz Fakhr-ud-din had on the occasion of his purchase made the slightest inquiry as to the title or endeavoured to ascertain how it came that Baldeo Prasad was in possession of the property, he must, if he did not already know what had occurred, have at all events then ascertained the facts connected with the sale to Baldeo Prasad. We cannot regard him as a *bonâ fide* purchaser without notice. If he had been a *bonâ fide* purchaser without notice of the sale to Baldeo Prasad he would have been in a very different position from that in which he at present

1904

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BALDEO  
PRASAD  
v.  
FAKHR-UD-  
DIN.

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1904

BALDEO  
PRASAD  
v.  
FAKHR-UD-  
DIN.

stands. The price of the property which was paid by Baldeo Prasad was Rs. 725. That money has been applied in satisfaction of the decree under which the sale by the Court took place, and we may mention that it fell very far short of satisfying the decree, which then amounted to a sum considerably over Rs. 4,000. The judgment-debtors had the full benefit of the sale. The Court of first instance dismissed the claim; but upon appeal the lower appellate Court reversed its decision, and gave a decree to the plaintiff on the ground that the sale to Baldeo Prasad was a mere nullity, and that consequently the plaintiff under his purchase from the heirs of Pahalwan Singh acquired a title to the property now in dispute and was entitled to oust the defendant from possession. We are unable to uphold this decision. It would be manifestly inequitable to allow the judgment-debtors, who stood by and allowed the purchase of the property to be made by an innocent purchaser, now to set up the invalidity of the sale and to deprive the purchaser of the benefit of his purchase. The plaintiff, who either was aware of the purchase made by Baldeo Prasad or else acted with gross negligence in making no inquiry as to the title, is in no better position. He cannot be regarded as a *bond fide* purchaser. He seeks under these circumstances to eject the appellant from the land purchased by him at a Court sale, and that too without offering to refund any portion of the price which was paid for the property. It appears to us under the circumstances that the plaintiff, if he sought the assistance of the Court in ousting the appellant from possession, ought at least to have made an offer to return to the appellant the proportionate part of the purchase money attributable to the property sought to be recovered. He comes into a Court of equity to ask its assistance, and in doing so he ought to be prepared to do equity. It appears to us that by the conduct of the heirs of Pahalwan Singh in allowing the sale of the entire property to be carried out in favour of Baldeo Prasad, in allowing possession of the property to be taken subsequent to the purchase, in not raising any objection to the substitution of the name of Baldeo Prasad in the revenue papers as owner of the property, in allowing Baldeo Prasad to deposit in Court the



full amount of the purchase money, and permitting the appropriation of that money to the satisfaction of the decree, neither they nor the plaintiff, who has not purchased in good faith, can complain if the Court refuses to grant the relief sought in this case. For these reasons we allow the appeal, set aside the decree of the lower appellate Court, and restore that of the Court of first instance with costs of this appeal and the costs in the lower appellate Court.

*Appeal decreed.*

## APPELLATE CIVIL.

*Before Mr. Justice Knox and Mr. Justice Aikman.*

JIWAN RAM AND OTHERS (DECREE-HOLDERS) v. RAM SARUP RAM  
AND OTHERS (JUDGMENT-DEBTORS).\*

*Act No. XV of 1877 (Indian Limitation Act) sections 7 and 8—Execution  
of decree—Limitation—Minority.*

*Held* that section 7 of the Indian Limitation Act, 1877, applies even where some only and not all of the judgment-creditors are affected by a legal disability. *Zamir Hasan v. Sundar* (1) followed.

On the 17th of December 1897, Jiwan Ram and others obtained a decree against Ram Sarup Ram and others from the Court of the Subordinate Judge at Ghazipur. The decree was transferred to Azamgarh for execution, and on the 26th of February 1898, execution was applied for by arrest of one of the judgment-debtors. That judgment-debtor was arrested on the 3rd of March 1898, and committed to jail, but was released on the 1st of July 1898, because the decree-holders failed to deposit the necessary diet-money. A second application was made on the 18th of February 1902, which was rejected as not having been made in due form. The present application for execution was made on the 9th of May 1903. This was dismissed by the Subordinate Judge of Azamgarh as time-barred. The decree-holders appealed to the District Judge, to

\* Second Appeal No. 66 of 1904 from a decree of J. L. Johnston, Esq., Officiating District Judge of Azamgarh, dated the 4th of December 1903, confirming an order of Babu Jai Lal, Subordinate Judge of Azamgarh, dated the 29th of August 1903.

(1) (1899) I. L. R., 22 All., 199.

1904

BALDEO  
PRASAD  
v.  
FAKHR-UD-  
DIN.

1904

June 15.

1904

JIWAN  
RAM  
v.  
RAM SARUP  
RAM.

whose notice it was apparently brought that a second application for arrest of one of the judgment-debtors had been made on the 24th of March 1899. This, however, the District Judge held, could not save limitation, inasmuch as it was not an application according to law—*Chattar v. Newal Singh* (1). The District Judge accordingly dismissed the appeal. The decree-holders appealed to the High Court, where it was urged, apparently for the first time, that the fact that Jiwan Ram, one of the decree-holders, was a minor, prevented the execution of the decree from being barred by limitation having regard to the provisions of section 7 of the Indian Limitation Act, 1877.

Pandit *Sundar Lal* and Pandit *Baldeo Ram Dave*, for the appellants.

Sir *Walter Colvin*, for the respondents.

KNOX and AIKMAN, J.J.—The learned Judge has overlooked the fact that one of the decree-holders was a minor and entitled to the benefit of section 7 of the Indian Limitation Act of 1877. It has been held in the Full Bench case of *Zamir Hasan v. Sundar* (2) that this section applies even where some only and not all of the judgment-creditors are affected by a legal disability. The principle of this ruling was applied in a case exactly on all fours with this, namely, E. F. A. No. 279 of 1902, *Liladhar and others v. Chaturbhuj and others*, decided by a Bench of this Court on the 10th of May 1903. This appeal must succeed. We allow it with costs, set aside the orders of both the lower Courts with costs, and remand the case through the lower appellate Court to the Court of first instance with directions to readmit the application to its file of pending applications and dispose of it according to law. Future costs will abide the event.

*Appeal decreed and cause remanded.*

(1) (1889) I. L. R., 12 All., 64. (2) (1899) I. L. R. 23 All., 199.

## REVISIONAL CRIMINAL.

1904  
June 17.*Before Mr. Justice Know.*

EMPEROR v. ISHTIAQ AHMAD \*

*Act No. XLV of 1860 (Indian Penal Code), section 409—Criminal breach of trust—Form of charge—Criminal Procedure Code, section 234.*

In a charge of criminal misappropriation there were three counts. Each count specified the sum of money alleged to have been misappropriated by the accused on a particular day; but in two out of the three cases the total sum consisted of three separate items in each instance. *Held* that a charge so framed did not offend against section 234 of the Code of Criminal Procedure. *King-Emperor v. Gulzari Lal* (1) followed.

In this case one Ishtiaq Ahmad, Assistant Nazir of the Court of the District and Sessions Judge of Moradabad, was charged with criminal misappropriation of certain items of unexpended diet-money lodged in civil suits in the Courts of the District and Subordinate Judges. The charge contained three counts, alleging misappropriation on three different occasions of sums of Rs. 4-4, Rs. 1-5 and Rs. 3 out of larger amounts. Of these larger sums the first was stated to consist of three separate items of Rs. 1-6, Rs. 1-15 and Rs. 1-14, and the second of As. 4, 14 and 9 respectively. Ishtiaq Ahmad was convicted on all three counts by the Joint Magistrate of Moradabad, and was sentenced to rigorous imprisonment for one year on each, *i.e.*, three years in all. He appealed to the Additional Sessions Judge of Moradabad, who dismissed the appeal and did not interfere with the sentence. Ishtiaq Ahmad thereupon applied in revision to the High Court, where the principal pleas urged were two. It was contended that the charge as framed was bad in law having regard to section 234 of the Code of Criminal Procedure and the ruling of the Privy Council in *Subrahmaniam Ayyar v. King-Emperor* (2); and it was also argued that if the facts disclosed by the evidence for the prosecution were true, the petitioner was guilty of the offence of forgery of an acquittance or receipt acknowledging the payment of money, which was an offence exclusively triable by the Court of Session, and for that reason the jurisdiction of the Magistrate was ousted.

\* Criminal Revision No. 328 of 1904.

(1) (1902) I. L. R., 24 All., 254.

(2) (1901) I. L. R., 25 Mad., 61.

1904

EMPEROR  
v.  
ISHTIAQ  
AHMAD.

Mr. C. Dillon for the applicant.

The Assistant Government Advocate (Mr. W. K. Porter),  
for the Crown.

KNOX, J.—Ishtiaq Ahmad has been convicted of offences under section 409, Indian Penal Code, and sentenced to three years' rigorous imprisonment. The conviction and sentence have been upheld in appeal. It is first contended that the accused has been really tried for seven offences and not for three. This contention is in my opinion fully met by the provisions of section 222 of the Code of Criminal Procedure. I find that a similar view has been taken of a similar case in *King-Emperor v. Gulzari Lal* (1). The next contention urged before me is that, upon the evidence for the prosecution, the offence of forgery of a public record is disclosed as against the petitioner, and it is urged that he should have been committed to the Court of Session, and the Joint Magistrate should not have tried him for the minor offence under section 409 which is within his jurisdiction. It appears that, according to the evidence of the prosecution, not only did the accused embezzle moneys, but, after embezzling them and having taken the signature of the vakils concerned as receipt for them, he altered the items in the register. If this be true, the applicant seems to have been guilty, not only of an offence under section 409, but of a still more serious offence. The learned Sessions Judge who held a departmental inquiry, however, complained only of an offence under section 409, and as this was established by the evidence, the Magistrate proceeded to convict. I do not think he was bound to commit merely because the evidence disclosed another offence triable exclusively by the Court of Session. The complaint gave him jurisdiction to try the offence complained of, and, if it was established, to proceed to convict. I see no reason for interfering in revision, and dismiss the application.

(1) (1902) I. L. R., 24 All., 254.

## APPELLATE CIVIL.

*Before Mr. Justice Knox, and Mr. Justice Aikman.*

MAHABIR PRASAD RAI (PLAINTIFF) v. BISHAN DAYAL AND OTHERS  
(DEFENDANTS).\*

1904  
June 20.

*Evidence—Burden of proof—Bond reciting receipt of consideration—Subsequent denial of receipt of consideration—Act No. I of 1872 (Indian Evidence Act), section 102.*

Where execution of a bond is admitted and the bond contains an admission that consideration has passed, it is for the executant to get rid of the admission which he has made in the bond. It is not enough for him to prove that prior to the institution of a suit on the bond he denied receipt of consideration, even if such denial was made before the registering officer.

THIS was a suit for sale upon a mortgage bond. The bond, as usual, recited that the consideration therefor had been received by the mortgagors. But in the suit the executants, though they admitted execution of the bond, denied receipt of consideration. The Court of first instance (Munsif of Muhammadabad) held that the burden of proving want of consideration was on the executants, and that they had failed to discharge it, and accordingly gave a decree in the plaintiff's favour. Neither side produced any evidence. On appeal by the defendants the lower appellate Court (Subordinate Judge of Ghazipur) reversed the decree of the Munsif and dismissed the plaintiff's suit, holding that as the defendants all along denied receipt of consideration, it was for the defendant to prove that consideration had passed.

The plaintiff appealed to the High Court, and this appeal coming on for hearing before a single Judge was dismissed. The learned Judge said :—

"Ordinarily the rule is that when execution of a document and receipt of consideration has been admitted at registration, the burden of proving non-receipt of consideration falls upon the party who makes such allegation. Here, however, the case is somewhat different. The defendants before the registering officer acknowledged, no doubt, that they had executed the bond, and they still admit that such is the case; but before the registering officer they broadly and unmistakably stated that the obligee of the bond had not paid them the consideration money. I think this fact takes the case out of the general rule, and that in view of this denial of receipt of consideration when the bond was being registered, the burden of proving that as a matter of fact consideration had passed lies on the plaintiff. No evidence was given on either side, and therefore in my opinion this appeal fails."

\* Appeal No. 1 of 1903, under section 10 of the Letters Patent.



1904

MAHABIR  
PRASAD  
RAI  
v.  
BISHAN  
DAYAL.

The plaintiff thereupon filed a further appeal under section 10. of the Letters Patent.

Mr. *Muhammad Ishaq Khan*, for the appellant.

Babu *Sital Prasad Ghose*, for the respondents.

KNOX, J.—The suit out of which this appeal arises was a suit for sale upon the basis of a hypothecation bond. The respondents Kishan Dayal and Nihang Rai were the executants of the bond. In that bond it is expressly stated that the executants have received the consideration and brought it to their own use. In the suit throughout, the executants have admitted execution of the bond, but denied receipt of consideration. The Court of first instance held that the onus of proving want of consideration lay upon the executants, and that they had failed to discharge that burden; it therefore gave a decree in the plaintiff's favour. This decree was reversed on appeal. A second appeal was preferred to this Court and the decision of the lower appellate Court was affirmed. The learned Judge who heard the appeal laid down that "ordinarily the rule is that when execution of a document and receipt of consideration has been admitted at registration, the burden of proving non-receipt of consideration falls upon the party who makes such allegation." He further went on to hold that the fact that before the registering officer they (*i.e.*, the executants) "broadly and unmistakeably stated that the obligee of the bond had not paid them the consideration money" took the case out of the general rule; and that under the circumstances the burden of proving that as a matter of fact consideration had passed lay on the plaintiff, here appellant. With all due respect to our learned brother, I am unable to hold that anything has been shown in this case which takes it out of the rule laid down in section 102 and illustration (3) of the Indian Evidence Act of 1872. In this case no evidence at all was given on either side. Upon looking into the record of the case it appears that the suit was set down for hearing and final disposal upon the 16th of January 1901. Both parties previous to the day fixed for hearing had applied for an adjournment to enable them to produce evidence. The Munsif refused to grant the adjournment and disposed of the case on the day fixed for hearing in far too summary a manner,

having regard to the nature of the case and the fact that there had been no previous adjournments. The learned Munsif showed a want of discretion in not acceding to the application for adjournment made to him. The case should go back to the lower appellate Court in order that that Court may return it to the Court of first instance for trial of the matters in issue in the case, reasonable opportunity being given to both sides to adduce any evidence they may wish to produce.

AIKMAN, J.—I am of the same opinion. When in a suit like the present execution of the bond is admitted and the bond contains an admission that consideration has passed, it is for the executant to get rid of the admission which he has made in the bond. I do not think it is enough for him to prove that prior to the institution of the suit he denied receipt of consideration, even though that denial was made before the registering officer. I concur in the order proposed.

BY THE COURT.

We allow the appeal, set aside the decrees of this Court and of the Courts below, and we remand the case through the lower appellate Court to the Court of first instance with directions to re-admit the suit under its original number in the register of pending suits and dispose of it on the merits after giving the parties reasonable opportunities to produce such evidence as they wish to produce. Costs here and hitherto will abide the result.

*Cause remanded.*

*Before Mr. Justice Knox and Mr. Justice Aikman.*

SHEO NARAIN AND OTHERS (PLAINTIFFS) v. MATA PRASAD AND OTHERS (DEFENDANTS).\*

*Act No. IX of 1872 (Indian Contract Act), section 23—Act No. II of 1882 (Indian Trusts Act), section 82—Agreement opposed to public policy—Purchase of land by public officer benami—Representative debarred from claiming benefit of purchase.*

When a public officer enters into a contract which is unenforceable as being opposed to public policy, persons deriving title through him are in

\* Second Appeal No. 556 of 1903, from a decree of W. F. Wells, Esq., District Judge of Agra, dated the 2nd of March 1903, confirming a decree of Munshi Raj Nath Prasad, Subordinate Judge of Agra, dated the 14th of November 1902.

(1) (1900) I. L. R., 22 All., 220.

1904

MAHABIR  
PRASAD  
RAI  
v.  
BISHAN  
DAYAL.

1904

June 23.

1904

SHRO  
NARAIN  
v.  
MATA  
PRASAD.

no better position than himself, nor is their situation in any way affected by the provisions of the Indian Trusts Act, 1882. *Shiam Lal v. Chhaki Lal* (1) approved.

THE plaintiffs in this case sought a declaration of their rights as members of a joint Hindu family in certain shares in two villages, Seola and Barauli. The village of Seola, according to the plaintiffs, had been purchased by Jwala Prasad, the paternal uncle of the plaintiffs, while that of Barauli had, as they alleged, been purchased by Jainti Prasad, their father, in the name of Mata Prasad, the son of Jwala Prasad. The Court of first instance (Subordinate Judge of Agra) decreed the claim of the plaintiffs as to Seola, but dismissed it so far as Barauli was concerned. The plaintiffs appealed as to Barauli, and on this appeal the District Judge found that that village had really been acquired by Jainti Prasad, but that Jainti Prasad being a kanungo and therefore incapacitated from acquiring property in his own district, had taken the conveyance in the name of his nephew, Mata Prasad, in order to prevent Government from exercising the right of dismissal which might have been the result of the transaction coming to the notice of Government. Adverting to the law as laid down in the case of *Shiam Lal v. Chhaki Lal* (1), the learned District Judge held that the plaintiffs claiming title through Jainti Prasad could be in no better position than Jainti Prasad himself would have been, and he therefore dismissed the appeal. The plaintiffs appealed to the High Court, urging that the Government order upon which the District Judge had relied (Resolution No. 1252A of the 17th of September 1870, Manual of Government Orders, III., p. 84) had no application to kanungoes; that no public policy was transgressed by a kanungo purchasing land outside his circle; that section 82 of the Indian Trusts Act showed that the benamidar had no defence against the beneficial owner; and that the heirs of the beneficial owner were not in the same position as their predecessor in title.

Dr. Satish Chandra Banerji, for the appellants.

Pandit Sundar Lal, for the respondent.

KNOX and AIKMAN, JJ.—The object of the agreement between the predecessor in title of the plaintiffs and the defendants was regarded by the lower appellate Court as opposed to public policy, and therefore unlawful within the meaning of section 23 of Act No. IX of 1872. The view taken by the learned District Judge is supported by the decision of this Court in the case of *Shiam Lal v. Chhaki Lal* (1). It has been argued in this case that the principle of that ruling will not apply here, as the suit is one brought not by the public officer himself but by his heirs. If the public officer himself could not maintain the suit for the property, persons deriving title through him are in our opinion in no better position. Stress was laid upon section 82 of the Indian Trusts Act, but we do not think that that section can be interpreted as authorizing Courts to give effect to an agreement the object of which is unlawful. The appeal fails, and is dismissed with costs.

*Appeal dismissed.*

1904

SHEO  
NARAIN  
v.  
MATA  
PRASAD.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burdett.*

KUNDAN LAL AND ANOTHER (PLAINTIFFS) v. FAQIR CHAND AND  
OTHERS (DEFENDANTS).\*

*Act No. IV of 1882 (Transfer of Property Act), section 85—Non-joinder of necessary parties—Civil Procedure Code, section 32.*

Even if the non-joinder as a party defendant of a person who ought, in view of section 85 of the Transfer of Property Act, 1882, to have been made a party to a suit for sale on a mortgage is by itself a defect fatal to the suit, such defect is cured if the Court acting under section 32 of the Code of Civil Procedure adds such person as a defendant. *Kali Charan v. Ahmad Shah Khan* (1) referred to. *Salig Ram v. Har Charan Lal* (2) considered.

THE suit out of which this appeal arose was brought by the plaintiffs to recover the amount due to them on a mortgage, dated the 16th of August 1895, executed by the original first defendant Diwan. One of the defendants, Faqir Chand, who had been impleaded as a transferee of part of the mortgaged property, filed a written statement and pleaded that he and one

1904  
June 8.

\* Second Appeal No. 282 of 1903, from a decree of R. P. Dewhurst, Esq., District Judge of Saharanpur, dated the 22nd of December 1902, reversing a decree of Babu Ladli Parsad, Munsif of Kairana, dated the 3rd of December 1901.

(1) (1894) I. L. R., 17 All., 48.

(2) (1890) I. L. R., 12 All., 548.

1904

KUNDAN  
LAL  
v.  
FAQIR  
CHAND.

Janki Das were prior mortgagees of the property under a bond, dated the 14th of August 1880. The Court of first instance (Munsif of Kairana) thereupon took action under section 32 of the Code of Civil Procedure and added Janki Das as a defendant. Janki Das filed a similar defence to that which had been filed by his co-mortgagee Faqir Chand. Neither of the two alleged prior mortgagees, however, appeared in the suit either personally or by pleader. The Munsif in absence of proof of anything being due under the mortgage of 1880 passed a decree in favour of the plaintiffs for sale of the mortgaged property upon non-payment of what was found to be due upon their mortgage. Faqir Chand and Janki Das appealed, and the lower appellate Court (District Judge of Saharanpur), without entering into the merits of the case, reversed the Munsif's decision and dismissed the suit on the ground that the plaintiffs had failed to implead the prior mortgagees. The District Judge relied upon the decision of the High Court in the case of *Salig Ram v. Har Charan Lal* (2). The plaintiffs thereupon appealed to the High Court.

Mr. *Muhammad Ishaq* (for whom *Munshi Haribans Sahai*), for the appellants.

Babu *Satya Chandra Mukerji*, for the respondents.

STANLEY, C.J., and BURKITT, J.—The suit out of which this appeal has arisen was brought by the plaintiffs to recover the amount due to them on foot of a mortgage of the 16th of August 1895, executed by the original first defendant Diwan in their favour, by sale of the mortgaged property. When the case came on for hearing one of the defendants, Faqir Chand, who was impleaded as transferee of the mortgaged property, filed a written statement and set up the defence that there existed a prior mortgage of the 14th of August 1880, which had been executed by Diwan in favour of himself and one Janki Das. The learned Munsif at the hearing having regard to this contention came to the conclusion that the case was one in which the Court should exercise the power conferred by section 32 of the Code of Civil Procedure, and added Janki Das as a party defendant, and he accordingly passed an order to that effect.

(1) (1890) I. L. R., 12 All., 548.



The case came on again for hearing on the 2nd of October 1901, the newly added defendant having filed a written statement in which he set up the same defence as that which was set up by Faqir Chand. Neither of these defendants put in an appearance at the trial either personally or by pleader. In the absence, therefore, of any proof that any sum remained due on foot of the mortgage of the 14th of August 1880, the Munsif passed a decree for sale of the mortgaged property in favour of the plaintiffs on non-payment of the amount found to be due to them on foot of their mortgage. From this decree Faqir Chand and Janki Das appealed, alleging that the plaintiffs respondents had knowledge of their prior mortgage and had not expressed their willingness to pay off the amount due on foot of it, and that not having done so, the Court ought not to have granted a decree under section 88 of the Transfer of Property Act. They also alleged that the property sought to be sold was in their possession, under their mortgage-deed, and that that being the case the burden of proving that their mortgage had no existence, or that the amount due on foot of it had been satisfied, lay upon the respondents and not upon them. The defendants mortgagors submitted to the decree and did not appeal. The learned District Judge without entering into the merits of the case came to the conclusion on the authority of the case of *Salig Ram v. Har Charan Lal* (1) that the suit of the plaintiffs must fail, owing to the fact that they did not in their plaint implead the prior mortgagees. Whether or not we should be prepared to follow the decision in the case referred to, it appears to us that it does not govern the present case. The learned Judges who decided the case of *Kali Charan v. Ahmad Shah Khan* (2) observed:—“We are unable to lay down as a rule of universal application the principle that a plaintiff who claims too much or fails to admit reasonable deductions from his claim is therefore to be deprived of that to which he is legally entitled.” We concur in this observation. The case before us is distinguishable from the case which has been relied upon by the District Judge. Here no doubt the plaintiffs failed in the first instance to implead the prior mortgagees as mortgagees, though they did as a matter of

1904

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KUNDAN  
LAL  
v.  
FAQIR  
CHAND.

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(1) (1890) I. L. R., 12 All., 543.

(2) (1894) I. L. R., 17 All., 48.

1904

KUNDAN  
LAL  
v.  
FAQIR  
CHAND.

fact implead one of the prior mortgagees, but in a different capacity, namely as transferee of part of the mortgaged property. The Court, however, exercised the power conferred by section 32, and directed that the prior mortgagees should be brought on the record as defendants. It seems to us that this satisfied any obligation which lay upon the plaintiff in respect of the prior mortgage and put the mortgagees to proof of their claim. Whether or not anything was due on foot of the prior mortgage was a matter peculiarly within the knowledge of the mortgagees and a matter of which the plaintiffs would ordinarily be in ignorance. Under these circumstances we must allow the appeal, set aside the decree of the lower appellate Court, and, inasmuch as the appeal has been determined upon a preliminary point, the decision on which we have reversed, direct that the appeal be replaced on the file of pending appeals in its original number and be disposed of on the merits. The learned District Judge will note the observations which we have made with regard to the mortgage of the 14th of August 1880; the mortgagees ought to be in a position to prove the amount, if any, which is due on foot of it, and if any sum be found to be due, the plaintiffs can only get the relief which they claim upon the payment of such sum. Costs here and hitherto will abide the event.

*Appeal decreed and cause remanded.*

1904  
June 23.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkill.*

IDARAT KHAN (PLAINTIFF) v. ILAHI BAKHSH (DEFENDANT).\*

*Pleadings—Usufructuary mortgage—Purchase of equity of redemption—Suit by purchaser for redemption—Plea of right to pre-empt sale to plaintiff.*

The plaintiffs sued as purchasers of part of the equity of redemption of a usufructuary mortgage to redeem the mortgage and recover possession of a proportionate part of the mortgaged property. One of the mortgagees defendants pleaded that he had a right of pre-emption in respect of the sale which formed the basis of the plaintiffs' title and was ready and willing to exercise such right.

\* Second Appeal No. 922 of 1902 from a decree of Babu Nihal Chandra, Subordinate Judge of Shahjahanpur, dated the 28th of May 1902, confirming a decree of Maulvi Muhammad Azim-ud-din, Munsif of Shahjahanpur, dated the 4th of September 1901.

Held that this plea could not be admitted as an answer to the plaintiffs' suit for redemption. *Ajudhia Bakhsh Singh v. Arab Ali Khan* (1) and *Ram Chand v. Durga Prasad* (2) referred to.

IN this case the plaintiffs, alleging themselves to be the purchasers of the mortgagee rights in a portion of certain property which was the subject of a usufructuary mortgage, sued for redemption of a proportionate part of the mortgage and for recovery of possession of that portion of the mortgaged property which had been purchased by them. Amongst the numerous pleas taken by the various defendants, the first defendant *Ilahi Bakhsh* pleaded that he had a right to pre-empt the sale in favour of the plaintiffs, in right of which the plaintiffs had brought their suit. The Court of first instance (Munsif of Sahaswan) held that this defendant was not only entitled but bound to raise this plea, and on the facts found that he had the right of pre-emption which he asserted. The Munsif therefore gave a decree in the first instance for dismissal of the plaintiffs' suit provided that the defendant No. 1 paid in the pre-emptive price within thirty days from the date of the decree. But if he failed to pay in the pre-emptive price within thirty days, then the decree was to be a decree in favour of the plaintiffs. On appeal by one of the plaintiffs, *Idarat Khan*, this decree was affirmed by the lower appellate Court (Subordinate Judge of Saharanpur). *Idarat Khan* thereupon appealed to the High Court, urging that the first defendant's right of pre-emption was not in law an answer to the plaintiffs' suit for redemption, and if it was, the defendant must on the facts of the case be taken to have waived that right.

*Babu Lakshmi Narain*, for the appellant.

*Mr. Abdul Majid* (for whom *Mr. Ishaq Khan*), for the respondent.

STANLEY, C. J., and BURKITT, J.—The suit out of which this appeal has arisen was brought by the plaintiffs for redemption of a usufructuary mortgage. They sued as owners of part of the equity of redemption, which they had purchased from two of the representatives of the mortgagors. The claim was met by a defence on the part of one of the defendants,

1904

IDARAT  
KHAN  
v.  
ILAH  
BAKSH.

(1) (1885) I. L. R., 7 All., 892.

(2) (1903) I. L. R., 26 All., 61.

1904

IDARAT  
KHAN  
v.  
ILAH  
BAKHS.

Ilahi Bakhsh, to the effect that he was a co-sharer in the village and as such entitled to pre-empt the sale made in favour of the plaintiffs, if that sale was a valid sale and that he was willing to pre-empt it, and that therefore the suit could not be maintained. This contention found favour with both the lower Courts. They considered the relationship of the parties, and came to the conclusion that Ilahi Bakhsh was entitled to pre-empt the sale; and this being so, a somewhat extraordinary decree was passed to the effect that Ilahi Bakhsh should have an opportunity of pre-empting the sale made in favour of the plaintiffs; but that in default of his purchasing the property and paying the purchase money within a time named, the plaintiffs should be entitled to redeem the property. Now this is a very unusual and complicated form of decree, and one which is certainly not to be encouraged, even if it be valid. We think in this instance it is entirely wrong. In the case of *Ajudhia Bakhsh Singh v. Arab Ali Khan* (1) it was decided by a Bench consisting of Petheram, C. J., and Tyrrell, J., that a co-sharer who is in possession cannot plead the existence of a right of pre-emption in defence to a suit for possession by the purchaser of the rights and interests of another co-sharer. The defence of a right of pre-emption is not a valid defence in a suit to recover possession of property. This was so held in the recent case of *Ram Chand v. Durga Prasad* (2) overruling the decision in *Pulandar Singh v. Jwala Singh* (3). The case sought to be set up there was that a person who had a right to pre-empt and who did not in a suit for recovery of possession of property set up the right as a defence to the suit was precluded afterwards from setting up a claim for pre-emption. The Courts below have erred in this matter, and have in consequence decided this case upon a matter which ought not to have been entertained by them. We therefore allow the appeal, set aside the decrees of the lower Courts, and remand the suit under the provisions of section 562 of the Code of Civil Procedure to the Court of first instance, through the lower appellate Court, with directions

(1) (1885) I. L. R., 7 All., 892. (2) (1903) I. L. R., 26 All., 61.  
(3) (1898) I. L. R., 20 All., 516.

that it be replaced in its former number on the file of pending cases and be tried upon the merits. Costs here and hitherto will abide the event.

*Appeal decreed and cause remanded.*

1904

IDARAT

KHAN

v.

ILAH

BAKHSI.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.*

NAZIR HASAN (PLAINTIFF) v. SHIBBA AND ANOTHER

(DEFENDANTS).\*

1904

June 24.

*Land-holder and tenant—Accommodation provided in the abadi for agricultural tenant—Suit for ejectment—Custom.*

Some agricultural tenants had been occupying a room in an inclosure in the abadi for thirty years. *Held* on suit by the zamindar to eject them that the plaintiff had no cause of action; either the defendants had acquired a title by adverse possession, or if their possession was permissive, they could not according to custom be ejected while their tenancy was still undetermined.

IN this case the zamindar of mauza Sumli sued to eject two of his agricultural tenants from a room occupied by them in an inclosure situated in the abadi of the village. The principal plea of the defendants was one of adverse possession. The first Court (Munsif of Saharanpur) gave the plaintiff a decree. On appeal by the defendants the lower appellate Court (Subordinate Judge of Saharanpur) found, after an issue on the question had been remitted to the Munsif, that the defendants had been in possession for more than twelve years, and upon that ground alone decreed the appeal and dismissed the plaintiff's suit. The plaintiff appealed to the High Court.

Dr. Satish Chandra Banerji (for whom Munshi Haribans Sahai), for the appellant.

Mr. Abdul Raoof, for the respondents.

STANLEY, C. J., and BURKITT, J.—The plaintiff's suit was in our opinion properly dismissed by the lower appellate Court. The suit was brought by him to recover possession of a room in an inclosure in the abadi of the village of which the plaintiff is the zamindar and the defendants are the cultivating tenants. It is found that the defendants have been in possession of the

\*Second Appeal No. 849 of 1902, from a decree of Babu Madho Das, Subordinate Judge of Saharanpur, dated the 25th July 1902, reversing a decree of Pandit Girraj Kishore Dat, Munsif of Saharanpur, dated the 7th of January 1901.



1904

NAZIR  
HASAN  
v.  
SHIBBA.

room in question for a period of 30 years. Now it is apparent that either the tenants are entitled to the room in question as appurtenant to their holding, or, if it be not appurtenant to their holding, they have acquired it by adverse possession. Their tenancy is admittedly a subsisting agricultural tenancy. Therefore, if the room in question is appurtenant to their holding, as the tenancy has not been determined, the zamindar cannot oust them from possession of the room. If, on the other hand, the room in question is no part of the holding, then it is clear on the finding that the defendants have acquired a title to it by adverse possession. In either view the suit cannot be maintained. It is admitted, and appears to be undoubtedly the rule in these Provinces, that a tenant is given a room or house in the abadi to live in during the existence of his tenancy. It is difficult to understand how from any point of view tenants, as admittedly the defendants are of the plaintiff, can be properly ejected from the only residence which they possess during the continuance of their tenancy. For these reasons we dismiss the appeal with costs.

*Appeal dismissed.*

1904  
June 24.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burdett.*  
RANNU RAI AND OTHERS (DEFENDANTS) v. RAFI-UD-DIN  
(PLAINTIFF).\*

*Land-holder and tenant—Occupancy tenant—Usufructuary mortgage—  
Relinquishment of tenancy during the term of the mortgage.*

*Held* that an occupancy tenant who has made a usufructuary mortgage of his holding and put the mortgagee in possession cannot during the subsistence of such mortgage relinquish his holding to the prejudice of the mortgagee's rights. *Badri Prasad v. Sheodhian* (1) followed.

THE plaintiff in this case came into Court alleging that he was the usufructuary mortgagee of a certain cultivatory holding belonging to one Sheo Ahir; that shortly after the mortgage was executed the mortgagor had relinquished his holding to the zamindars, and that the defendants, mortgagor and zamindars,

\* Second Appeal No. 981 of 1902 from a decree of Mr. Muhammad Ishaq Khan, District Judge of Azamgarh, dated the 7th of July 1902, reversing a decree of Babu Murari Lal, Munsif of Muhammadabad Gohna, dated the 3rd February 1902.

had stopped the plaintiff from having the mortgaged lands cultivated. The defendant No. 1, said the plaintiff, "had no power to give up the mortgaged land after he had mortgaged it, nor can the plaintiff be deprived of the possession of the mortgaged land owing to the collusive and fraudulent proceedings." The Court of first instance (Munsif of Muhammadabad Gohna) held that the mortgagor, according to the provisions of the village wajib-ul-arz, had no power to mortgage his holding, and accordingly dismissed the suit. On appeal, the lower appellate Court (District Judge of Azamgarh) reversed the Munsif's decree and gave the plaintiff a decree for possession of the mortgaged property. The zamindars appealed to the High Court, urging that on a correct interpretation of the wajib-ul-arz the mortgagor had no power to mortgage his holding to the plaintiff, and therefore that the decree of the Court of first instance should be restored.

Mr. J. Simeon, for the appellants.

Mr. Abdul Raoof, for the respondents.

STANLEY, C. J., and BURKITT, J.—In view of the decisions of this Court in regard to the possession of occupancy tenants and usufructuary mortgagees deriving title under them, this appeal must fail. An occupancy tenant mortgaged his occupancy tenancy to the plaintiff on the 21st of May 1900 to secure a sum of Rs. 80, and in pursuance of the terms of the mortgage the plaintiff was put in possession of the holding. After this the zamindars brought a suit to recover arrears of rent against the tenant, whereupon a compromise was entered into under the terms of which the tenant relinquished his tenancy, and thereupon the zamindars defendants ousted the plaintiff from possession. It has been held by this Court in the case of *Badri Prasad v. Sheodhian* (1) that an occupancy tenant who has granted a lease of part of his occupancy holding cannot during the subsistence of the term of the lease relinquish his holding to the zamindar so as to put an end to the lessee's rights under the lease. Following the principle laid down in that case it has also been held that where an occupancy tenant grants a usufructuary mortgage of his occupancy holding,

(1) (1896) I. L. R., 18 All., 354.

1904

RANNU  
RAI  
v.  
RAFI-UD-  
DIN.

1904

RANNU  
RAI  
v.  
RAFI-UD-  
DIN.

the tenant cannot relinquish his tenancy to the prejudice of the mortgagee. It follows that the tenant in this case was not justified in relinquishing his tenancy to the zamindars, and that that relinquishment cannot be allowed to operate to the prejudice of the plaintiff. The Court of first instance dismissed the claim of the plaintiff, but the learned District Judge, taking a proper view of the rights of the parties, reversed the decree of the Court of first instance and decreed the plaintiff's claim. This decision was in our opinion perfectly correct. We therefore dismiss the appeal with costs.

*Appeal dismissed.*

1904  
June 29.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.*

UDIT UPADHYA (PLAINTIFF) v. BHAWANI DIN AND OTHERS

(DEFENDANTS).\*

*Construction of document—Promissory Note—Acknowledgment—Act No. II of 1899 (Indian Stamp Act), schedule I, article 1.*

Three persons borrowed money from a fourth, and at the time a memorandum signed by the borrowers was drawn up in the following terms:—“Account (*lekha*) of Bhawani Din Kalwar, Katwari Kalwar and Bindesri Kalwar, 8th February 1901, interest 1 per cent per mensem, payable 3rd May 1901, Rs. 500 borrowed from Udit Upadhyia for a sugar factory.” The document contained no promise to repay the money. *Held* that this was a mere memorandum which might perhaps amount to an acknowledgment such as would require a 1 anna stamp, which it bore, but was certainly neither a promissory note nor an acknowledgment coupled with a promise to repay, which would require a stamp of higher value, and would not exclude parol evidence of the contract.

THE suit out of which this appeal arose was brought to recover Rs. 500 which, the plaintiff alleged, had been borrowed from him by the defendants on the 8th of February, 1901, under a promise to repay the same, with interest at 1 per cent. per mensem, on the 3rd May 1901. The plaintiff as part of the evidence in his case tendered a memorandum signed by the defendants, which was couched in the following terms:—“Account (*lekha*) of Bhawani Din Kalwar, Katwari Kalwar, and Bindesri Kalwar, 8th February 1901, interest 1 per cent. per mensem, payable 3rd of May 1901, Rs. 500, borrowed from

\* Second Appeal No. 587 of 1903 from a decree of Syed Muhammad Ali, District Judge of Jaunpur, dated the 12th of February 1903, confirming a decree of Maulvi Shams-ud-din Khan, Munsif of Jaunpur, dated the 10th of December 1902.

Udit Upadhyia, for a sugar factory." The memorandum bore a stamp of the value of 1 anna. The Court of first instance (Munsif of Jaunpur) holding this document to amount to a promissory note, and finding it to be insufficiently stamped, dismissed the plaintiff's suit, refusing to allow him to produce parol evidence of the transaction. The plaintiff appealed, but the lower appellate Court (District Judge of Jaunpur) confirmed the Munsif's decree on the finding that the memorandum in question was either a promissory note or a bond, or perhaps an acknowledgment coupled with a promise to repay within article 1 of the first schedule to the Indian Stamp Act, 1899. The plaintiff appealed to the High Court.

Munshi *Gokul Prasad*, for the appellant.

Mr. *Abdul Jalil*, for the respondents.

1904

UDIT  
UPADHYA  
v.  
BHAWANI  
DIN.

STANLEY, C. J., and BURKITT, J.—In this appeal we are unable to agree with any of the opinions expressed by the two lower Courts. We think those opinions are absolutely wrong. The suit was one to recover the sum of Rs. 500 lent by the plaintiff appellants to the defendants respondents. The allegations of the plaint are that on the 8th of February 1901 the plaintiff lent that sum to the defendants, which they promised to repay with interest at 1 per cent. per mensem on the 3rd May 1901. The debt being unpaid on that date, this suit was instituted to recover it. The cause of action, it will be seen, arose on the date when the debt became payable, and remained unpaid. Now at the time when the money was borrowed a paper was written and signed by the three defendants who borrowed the money. That paper or memorandum is in these words:—"Account (lekha) of Bhawani Din Kalwar, Katwari Kalwar and Bindesri Kalwar, 8th February 1901, interest 1 per cent. per mensem, payable 3rd of May 1901, Rs. 500, borrowed from Udit Upadhyia for a sugar factory." This document was considered by the Court of first instance to be an acknowledgment which contains a promise to repay the sum borrowed. The translation given by the Munsif is misleading, as he inserted in it the words "with a promise to repay it." No such words are to be found in the original. The learned Munsif then having inserted these words in the document

1904

UDIT  
UPADHYA  
v.  
BHAWANI  
DIN.

went on to hold that as the document contained those words it should be treated as a "promissory note" and should have been stamped as such. He therefore impounded it and sent it to the Collector. Further, misapplying the opening clause of section 91 of the Evidence Act, he refused to allow the plaintiff to give any parol evidence of the debt. The District Judge in appeal went further than the Munsif. He apparently was unable to decide whether this document was a promissory note or was a bond, and seemed also to think that it might be an acknowledgment which under Article 1 of Schedule I of the Stamp Act of 1899 required a stamp of more than one anna. He also concurred with the Munsif in excluding parol evidence of the debt, holding that the document contained a promise to repay the loan. Now in all those matters we think the lower Courts were wrong. The document, as we understand it, is not a promissory note, it is not a bond, and it is not an acknowledgment of a debt containing a promise to repay the debt or a stipulation to pay interest. To us it clearly appears to be nothing more than a mere memorandum, or note drawn up between the parties as to a transaction which had just been settled between them. There are in it no words containing any promise to repay or any stipulation to pay interest. In our opinion it is no more than if it had contained simply the words:—"Memorandum, Rs. 500, interest 1 per cent. per month, term 3 months:" signed by the borrowers. Briefly put these words contain everything which was in the document produced in support of the appellants' case. We are very doubtful even that it is an acknowledgment requiring to be stamped with the anna stamp it bears. As to that matter, however, as the stamp has been affixed on it we say nothing more. We must allow this appeal. We set aside the decision of the two lower Courts, and as the suit was dismissed by them on a preliminary point and we have reversed their decisions on that point, we remand the case under section 562 of the Code of Civil Procedure through the lower appellate Court to the Court of first instance, to be replaced on the file of pending suits and decided on the merits. The plaintiff is entitled in any case to his costs of this appeal. Other costs will abide the event.

*Appeal decreed and cause remanded.*



*Before Mr. Justice Know.*

DURGA DAS (PLAINTIFF) v. GULLU (DEFENDANT).\*

1904  
July 1.

*Act No. VII of 1889 (Succession Certificate Act), section 5—Succession certificate not to be questioned by any Court in subsequent proceedings based thereon.*

Where a certificate of succession has been granted by a Court empowered under Act No. VII of 1889 to grant such certificates it is not open to a Court before which such succession certificate is produced as authority to collect the debt entered therein to question the right of the Court which granted the certificate.

THE plaintiff in this case sued as assignee of the heir of the original mortgagee for recovery of money due on a mortgage-deed. The assignee, who had obtained a certificate of succession in respect of the debt, was made a party defendant to the suit. The Court of first instance (Munsif of Agra) found for the plaintiff on the merits. In the course of his judgment the Munsif said—"Objection had been taken by the defendant (heir of the mortgagor) to the amount of interest not covered by the plaintiff's (*sic*, ? second defendant's) succession certificate. As this objection seemed valid, and in the certificate filed before me there was an obvious error—only the principal amount was entered in the certificate—I therefore reserved judgment so as to enable the plaintiff (? second defendant) to obtain extension of certificate. The amount entered in the extended certificate is Rs. 160-5, which is the interest which would be due from the date of the mortgage up to the date of the original certificate. No certificate for subsequent interest is necessary." The Munsif accordingly decreed the plaintiff's claim. The defendant No. 1 appealed both as to the merits of the case and as to the grant of the extended succession certificate under which the plaintiff claimed interest. The lower appellate Court (Small Cause Court Judge of Agra with powers of a Subordinate Judge) modified the decree of the Munsif by disallowing the interest claimed by virtue of the extended certificate, which he held to be invalid. The plaintiff thereupon appealed to the High Court, pleading that the extended certificate was good in law, and that in any

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\* Second Appeal No. 222 of 1903 from a decree of Rai Bahadur Babu Baij Nath, Judge of Small Cause Court, exercising powers of the Subordinate Judge of Agra, dated the 9th of December 1902, modifying a decree of Babu Baidia Nath Das, Munsif of Agra, dated the 2nd July 1902.

1904

DURGA  
DAS  
v.  
GULLU.

case it was not open to the lower appellate Court to hold that it was invalid.

The Hon'ble Pandit Madan Mohan Malaviya, for the appellant.

Dr. Satish Chandra Banerji, for the respondent.

KNOX, J.—The question which I have to decide in this second appeal is whether the Court below had any jurisdiction to hold that a certificate which the appellant had obtained under the Succession Certificate Act of 1889 from a District Court was an invalid certificate and the amount entered in it as money the collection of which it authorized was in consequence money which the appellant was not empowered to collect. I think that there can be no doubt whatever as to the answer which should be given to this question. The power of granting certificates and of extending such certificates has been conferred upon District Courts by the Succession Certificate Act of 1889. When such a certificate has been granted by the Court so empowered, it is not open to the Court before which such succession certificate is produced as authority to collect the debt entered therein to question the right of the Court which granted the certificate; to hold otherwise would be to open the door to confusion and give opportunity for fraud.

The appeal is decreed and the decree of the lower appellate Court is set aside, and that of the Court of first instance restored with costs.

*Appeal decreed.*

1904  
July 1.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice  
Burkitt.*

JAGAR NATH SINGH (DEFENDANT) v. JAI NATH SINGH AND OTHERS  
(PLAINTIFFS).\*

*Joint property—Exclusives dealing with joint property by one of the co-owners  
—Remedy of the other co-owners—Form of decree.*

Upon the death of the tenant of land which was the property of four persons jointly, one of the co-sharers took possession of the tenant's holding and commenced to cultivate it himself. The remaining co-

\* Second Appeal No. 1075 of 1902, from a decree of Rai Anant Ram, Subordinate Judge of Ghazipur, dated the 23rd of July 1902, confirming a decree of Maulvi Syed Hidayat Ali, Munsif of Saidpur, dated the 15th of July 1901.

sharers brought a suit to recover possession—apparently actual physical possession—of three-quarters of the tenant's holding thus occupied by the defendants.

*Held* that the decree to which the plaintiffs were entitled was a decree declaring that they and the defendant were joint owners of the land in dispute, and that the plaintiffs were, as such joint owners, entitled to an account of the profits of the land. *Bhola Nath v. Buskin* (1), *Ram Jatan Shukul v. Jaisar Shukul* (2) and *Rahman Chaudhri v. Salamat Chaudhri* (3) referred to. *Bharon Rai v. Saran Rai* (4) distinguished.

THE plaintiffs and the defendants were joint owners of certain zamindari property. One Chedi, who was their joint tenant, died without heirs, and on his death one of the co-owners—the defendant appellant Jagar Nath Singh—took possession of Chedi's holding and proceeded to cultivate it himself. The other three co-owners sued to recover possession of three-fourths of Chedi's holding, meaning thereby apparently physical possession, and also claimed mesne profits. The Court of first instance (Munsif of Saidpur) gave the plaintiff a decree for joint possession of the land, and for mesne profits. Upon appeal the lower appellate Court (Subordinate Judge of Ghazipur) confirmed the decree of the Munsif. The defendant accordingly appealed to the High Court.

Babu *Sital Prasad Ghosh*, for the appellant.

Maulvi *Muhammad Ishag*, for the respondents.

STANLEY, C. J.—The facts of this case are very few and simple.

One Chedi Barhai, who was a tenant of the parties to the suit, died without heirs. After his death the defendant appellant Jagar Nath Singh, one of the co-sharers, took possession of the tenant's holding and proceeded to cultivate it. The plaintiffs respondents, who are co-sharers with the defendant appellant, brought this suit to recover possession of three-fourths of Chedi Barhai's holding, by which I understand that they seek to obtain physical possession of three-fourths of the holding, and they also claimed mesne profits of the land. In effect they ask a civil Court to partition land paying revenue amongst the co-sharers. It is to be noted that Jagar Nath Singh did nothing illegal when he entered into possession of derelict

1904

JAGAR  
NATH  
SINGHv.  
JAI NATH  
SINGH.

(1) Weekly Notes, 1894, p. 127.  
(2) Weekly Notes, 1894, p. 166.

(3) Weekly Notes, 1901, p. 48.  
(4) (1904) I. L. R., 26 All., 588.

1904

JAGAR  
NATH  
SINGH  
v.  
JAI NATH  
SINGH.

land which belonged to him and his co-sharers. He was entitled to do so, and to cultivate the lands, but for the benefit of himself and his co-sharers. The Court of first instance did not grant the relief which the plaintiffs claimed as stated above, but passed a decree which was not asked for, namely, a decree for joint possession of the land, and for mesne profits. Upon appeal the learned Subordinate Judge confirmed the decree of the lower Court.

Now, it was decided by my learned colleague in the case of *Rahman Chaudhri v. Salamat Chaudhri* (1) that where co-sharers in an undivided mahal come into Court complaining that other co-sharers having a like interest with themselves have taken possession of part of the joint property, the only relief which a civil Court can give is a decree declaring the plaintiffs to be entitled to possession jointly with the other co-sharers. A civil Court cannot give a decree in favour of co-sharers under which a co-sharer may be ejected from any portion of the common property. I am surprised to find that this case has not yet appeared in the Indian Law Reports, as it is a decision of importance. I have had occasion in several cases to consider this question, and I am entirely in accord with my learned colleague in his decision upon this question. It appears to me that if co-sharers desire to sue a co-sharer who is in occupation of joint property, and who has not obtained possession illegally, the only course open to them is to apply for and obtain partition. It is true that the co-sharer in possession must account to the other co-sharers for the profits of the land of which he is in exclusive physical possession. The decision of a Full Bench of this Court in the case of *Bhairon Rai v. Saran Rai* (2) is not, as it appears to me, in conflict with this view. I was a member of the Bench which decided that case, and it was determined upon the ground that the defendant in the suit had illegally ousted a co-owner from joint possession. In that Full Bench case my brother Banerji, referring to the judgment of my brother Burkitt in the case of *Rahman Chaudhri v. Salamat Chaudhri*, says:—"I must confess that with some of the observations contained in that judgment I am not

(1) Weekly Notes, 1901, p. 48. (2) (1904) I. L. R., 26 All., 588.

prepared to agree." The learned Judge does not specify what those observations are, but they cannot, I think, refer to any observation made in regard to the substantial question before the Court; for I find that my brother Banerji was a party to the decision in the case of *Bhola Nath v. Buskin* (1), the facts of which are on all fours with the case now before the Court, as also with the case of *Rahman Chaudhri v. Salamat Chaudhri*. In the former case it was decided that where one co-sharer in a *thok* sued the lessee of other co-sharers in the *thok*, the lessee being in actual physical possession of a portion of the land comprised in the *thok*, for joint possession and for mesne profits, the only decree which could be given was a declaration that the plaintiff was entitled to an undivided share in the *thok* and for a proportionate share of rents and profits, and that the plaintiff was not entitled to get a decree for mesne profits against the lessee defendant. There is even a stronger expression of opinion upon this question of the same learned Judges, who decided the last mentioned case, in the case of *Ram Jatan Shukul v. Jaisar Shukul* (2). As regards profits, it is clear that the plaintiffs are entitled to have the profits taken into consideration and an account rendered by the defendant appellant when the village accounts are settled. For these reasons it appears to me that the decrees of the lower Courts cannot stand and that the proper decree is to declare that the defendant appellant and the plaintiffs-respondents are joint owners of the holding in dispute, and that the plaintiffs respondents as such are entitled to an account of the profits of the land so long as it is in the possession of the defendant appellant.

BURKITT, J.—I concur in the order proposed by the learned Chief Justice and in the reasons by which it is supported. But as I am the Judge responsible for the decision in the case of *Rahman Chaudhri v. Salamat Chaudhri* (3), I desire to add a few words. The facts of that case are exactly on all fours with and indistinguishable from the facts of the present case. In that case, as in this, we have as parties co-sharers in an undivided mahal. We have one co-sharer taking possession of some derelict land which has been abandoned by the

1904

JAGAR  
NATH  
SINGHv.  
JAI NATH  
SINGH.

(1) Weekly Notes, 1894, p. 127. (2) Weekly Notes, 1894, p. 166.

(3) Weekly Notes, 1901, p. 48.



1904

JAGAR  
NATH  
SINGH  
v.  
JAY NATH  
SINGH.

tenant. We have also a suit by the other co-sharers against the co-sharer who so took possession, claiming in the present case actual physical possession, but in the case reported in Weekly Notes 1901, p. 48, joint possession with the co-sharer in possession. In that case I held that the only decree to which the plaintiffs co-sharers were entitled was a decree declaring them to be with the defendants joint owners of the land in question, and as such entitled to receive from the co-sharer in possession their proper share of the profits of that land at the annual settlement of the village accounts. I see no reason whatsoever to resile from any proposition of law stated by me in that judgment. I have had frequently to consider it since that judgment was delivered, and the more I have turned over the matter in my mind the more convinced I am that the law I laid down there is correct. For these reasons, concurring with the learned Chief Justice, I would partially allow this appeal and restrict the decree in favour of the plaintiffs respondents to that I have just mentioned.

BY THE COURT.—The order of the Court is that this appeal be partially allowed, and that instead of the decree for joint possession given to the plaintiffs respondents, a decree in their favour be passed declaring that they as co-sharers in an undivided mahal are joint owners with the defendant of the land in question, and as such entitled to receive their proper share of the profits of the land. We allow no costs to either side.

*Decree modified.*

1904  
July 2.

## REVISIONAL CRIMINAL.

*Before Mr. Justice Aikman.*

EMPEROR v. KALLU.\*

*Review—Powers of High Court in criminal cases—Finality of order of High Court—Order not sealed—Criminal Procedure Code, sections 107 and 110—Security for keeping the peace—Security for good behaviour.*

An application from jail—worded as an appeal—against an order passed under sections 110 and 118 of the Code of Criminal Procedure was summarily rejected by means of the following order:—"No appeal lies in this case, and

\* Criminal Revision No. 381 of 1904

no sufficient ground appears for interference in revision. The application is dismissed." This order was signed by the Judge who passed it, but was not sealed with the seal of the Court.

*Held* that the Judge who had passed the order quoted above was not under the circumstances precluded from entertaining an application for revision presented by counsel in relation to the same matter. *Queen-Empress v. Lalit Tiwari* (1), followed.

*Held* also that where it appears from the evidence that there is an apprehension of anyone using violence towards a particular person or particular persons he ought to be bound over to keep the peace as provided by section 107, and not be proceeded against under section 110 of the Code of Criminal Procedure.

IN this case an order was passed against one Kallu under section 110 of the Code of Criminal Procedure, on the ground that there was danger of Kallu proceeding to acts of violence against one Murlidhar or Murlidhar's partisans. That order was upheld by the Sessions Judge. Kallu, who was unable to find the sureties required, was sent to jail, and from there a petition was forwarded to the High Court against the orders of the Magistrate and the Sessions Judge. This petition, which was framed as an appeal, was rejected summarily by the following order:—"No appeal lies in this case, and no sufficient ground appears for interference in revision. The application is dismissed." This order was passed on the 10th of May 1904, and was signed by the Judge who passed it, but was not sealed with the seal of the Court. On the 14th of May an application in revision in the same matter was presented by counsel, and was admitted, after the record had been sent for on the 4th of June 1904, by the same Judge who had passed the order of the 10th of May 1904 above quoted.

Mr. A. E. Howard, for the applicant.

The Assistant Government Advocate (Mr. W. K. Porter), for the Crown.

AIKMAN, J.—This is an application for the revision of an order of the learned Sessions Judge of Aligarh passed under the provisions of section 123 of the Code of Criminal Procedure whereby the learned Judge confirmed the order of a Magistrate directing the petitioner to execute a bond in the sum of

(1) (1899) I. L. R., 21 All., 177.

1904

EMPEROR  
v.  
KALLU.

1904

EMPEROR  
v.  
KALLU.

Rs. 2,000 with two sureties in like amount for his good behaviour for a period of three years.

The learned Assistant Government Advocate took a preliminary objection to the hearing of this application. On the 10th May last a petition of the present applicant Kallu forwarded through the Superintendent of the the jail in which he is confined owing to his failure to furnish the security named above came before me. That petition was in the form of an appeal against the order of the Sessions Judge. It was summarily dismissed by me by the following order:—"No appeal lies in this case and no sufficient ground appears for interference in revision. The application is dismissed." The learned Assistant Government Advocate contends, and he has argued the point very ably, that the order quoted is final and that no further application for revision can be entertained. In support of his argument the learned Assistant Government Advocate has relied on the decisions in the cases of *Empress of India v. Muhammad Jafir* (1), *Queen-Empress v. Durga Charan* (2), *Queen-Empress v. Fox* (3) and *In the matter of the petition of F. W. Gibbons* (4). On the other hand, the learned counsel for the applicant points out that my order of the 10th May 1904, even if it can be called a judgment, has not yet been sealed, and therefore, with reference to the case of *Queen-Empress v. Lalit Tiwari* (5), I am not precluded from reviewing it. In my opinion the case last cited, by the decision in which I am bound, is sufficient to meet the objection which has been raised. It might also be argued on behalf of the applicant that my order of the 10th May last was an order dismissing, not an application for revision, but a petition of appeal, coupled with a remark to the effect that there then appeared to be no ground for taking up the case in revision, and that this cannot prevent the Court from dealing with an application for revision, when such an application is presented. I therefore proceed to deal with the application on its merits.

The petition of the prisoner set forth no ground upon which the Court could interfere in revision. The petition which has

(1) (1881) I. L. R., 3 All., 545.

(3) (1885) I. L. R., 10 Bom., 176.

(2) (1885) I. L. R., 7 All., 672.

(4) (1886) I. L. R., 14 Calc., 42.

(5) (1899) I. L. R., 21 All., 177.

1904

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EMPEROR  
v.  
KALLU.

since been presented on behalf of the applicant Kallu does in my opinion show that the order of the learned Judge is open to objection on the score of illegality. In his judgment the learned Judge says:—"On reading the evidence I am not disposed to accept the statement that the defendants are thieves and robbers, although it is quite possible that they keep persons of bad character in their employ for the purpose of waging war on their enemies. However, there is no clear allegation to this effect. The evidence considered in connection with the history of the village satisfies me that there is a probability of further violent crime being committed by or at the instigation of the defendant Kallu, that he is, in the words of section 110(f), so desperate and dangerous as to render his being at large, without security, hazardous to the community. The fact that his violence would be directed against Murlidhar and possibly some of his party only does not appear to place the case beyond the scope of section 110, as a riot or a single murder is a menace to the peace of the community." The learned counsel for the applicant contends, and I think with reason, that on the evidence as here described the case is one in which his client should have been bound over to keep the peace, and that he ought not to have been called on to furnish security for good behaviour. In my opinion when the evidence shows that there is an apprehension of anyone using violence towards a particular person or particular persons he ought to be bound over to keep the peace as provided by section 107, and ought not to be proceeded against under section 110 of the Code of Criminal Procedure. The learned counsel does not ask that the case should be sent back to the Magistrate, and does not object to my passing the order which ought to have been passed, and accordingly I proceed to do so under the provisions of section 439 read with section 423, sub-section I, clause (d), of the Code of Criminal Procedure. I also make some reduction in the amount of the security called for, which I think on the facts stated by the judge is excessive. Setting aside the order of the learned Judge I direct that the applicant Kallu execute a bond in the sum of Rs. 2,000 with two sureties in the sum of Rs. 500 each for keeping the peace for one year. In default of the applicant furnishing the required

1904

EMPEROR  
v.  
KALLU.

security he will undergo simple imprisonment for one year with effect from the date of this order or until within such period the required security be furnished.

1904  
July 2.

## APPELLATE CIVIL.

*Before Mr. Justice Blair.*

SAHADUR (PLAINTIFF) v. RAJWANTA (DEFENDANT).\*

*Hindu law—Suit for restitution of conjugal rights—Plaintiff's suit not barred by his being out of caste.*

*Held* that to bar a suit brought by a Hindu for restitution of conjugal rights, the defendant must set up some offence of a matrimonial nature such as would support a decree for judicial separation. It is not a defence that the plaintiff is out of caste, nor ought a decree to be made conditioned on the plaintiff being restored to caste. *Paigi v. Sheo Narain* (1) and *Binda v. Kaunsilia* (2) referred to.

SAHADUR, Kunbi, sued for restitution of conjugal rights in respect of his wife, Musammat Rajwanta, a minor under the guardianship of her mother Puna. The defendant's principal plea was that the plaintiff was out of caste, and therefore no such decree as that asked for could be given. The Court of first instance (Munsif of Benares) found that the plaintiff was not out of caste, and that, even if he was, that fact could form no defence to the suit. On appeal by the wife the lower appellate Court (District Judge of Benares) came to an opposite conclusion. It found that the plaintiff had been outcasted, and considering that under such circumstances only a conditional decree could be given, according to the ruling in *Paigi v. Sheo Narain* (1), passed such a decree directing that the plaintiff should first obtain restoration to caste as a condition precedent to his obtaining a decree for restitution of conjugal rights. Against this decree the plaintiff appealed to the High Court.

Babu *Durga Charan Banerji*, for the appellant.

The respondent was not represented.

\* Second Appeal No. 210 of 1903, from a decree of J. Sanders, Esq., District Judge of Benares, dated the 13th of December 1902, modifying a decree of Maulvi Saiyid Muhammad Shafi, Munsif of Benares, dated the 20th of September 1902.

(1) (1885) I. L. R., 8 All., 78.

(2) (1890) I. L. R., 13 All., 126.



BLAIR, J.—In this case it is to be regretted that the respondent is not represented in this Court. The appellant was a plaintiff in a suit for restitution of conjugal rights. The only answer to the claim was that he was out of caste, and therefore such suit could not be decreed. There is a case reported in the Indian Law Reports, 8 Allahabad, at p. 78—*Paigi v. Sheo Narain*—in which it was held that a plaintiff asking for restitution of conjugal rights and being at the time out of caste might properly have given to him by the Court a decree for restitution subject to his obtaining re-admission to caste. That rule, however, does not seem to be consistent with an exceedingly careful and elaborate judgment of Mahmood, J., with the assent of Straight, J., reported in the Indian Law Reports, 13 Allahabad, at p. 126 (*Binda v. Kaunsilia*). In that case it was held that to bar a suit for restitution of conjugal rights the defendant must set up some offence of a matrimonial nature such as would support a decree for judicial separation. I notice that Straight, J., was a party to both cases. I prefer the latter ruling in 13 Allahabad, and I therefore allow this appeal, granting the plaintiff a decree for restitution of conjugal rights without appending thereto the condition that he be restored to caste. The appellant will have the costs of this appeal.

*Appeal decreed.*

1904

SAHADUR  
v.  
RAJWANTA.

## FULL BENCH.

1904

July 4.

*Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Blair,  
and Mr. Justice Burkitt.*

INAYAT SINGH (PLAINTIFF) v. IZZAT-UN-NISSA BEGAM AND OTHERS  
(DEFENDANTS.)\*

*Mortgage—Prior and subsequent incumbrances—Sale under decree on puisne mortgage notifying prior incumbrances—Purchase by decree-holder—Prior incumbrances declared invalid—Suit by owner to recover from decree-holder auction purchaser the amount due on the prior incumbrances.*

Certain villages were put up to sale in execution of a decree under section 88 of the Transfer of Property Act, 1882, and it was notified in the proclamation of sale issued under section 287 of the Code of Civil Procedure

\*First Appeal No. 157 of 1902, from a decree of Babu Prag Das, Subordinate Judge of Bareilly, dated the 1st of April 1902.

1904

INAYAT  
SINGH  
v.  
IZZAT-UN-  
NISSA  
BEGAM.

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that there were two prior mortgages on the property to be sold, of the 25th of May and the 2nd of December 1877, respectively. The holder of the decree under execution obtained leave from the Court to bid at the sale, and purchased eight villages at a very low figure. Meanwhile, as the result of suits on the two mortgages of 1877, those mortgages were declared to be invalid. Subsequently the person entitled to the proprietary rights in the mortgaged property sued to recover from the auction purchaser and her representatives in interest the amounts due on the two mortgages of 1877.

*Held* by STANLEY, C. J., and BLAIR, J. (*Dissentiente* BURKITT, J.) that what the decree-holder auction purchaser purchased was only the equity of redemption in the mortgaged property and not the whole of the proprietary rights therein. The prior mortgages of 1877 having been found to be invalid, the rightful owner of the property was in equity entitled to recover from such purchaser of the equity of redemption such amount of the principal and interest secured by those mortgages as was proportionate to the value of the property the equity of redemption in which had been purchased. *Simbhu Nath Panday v. Golab Singh* (1), *Pettachi Chettiar v. Sangili Veera Pandia Chinnathambiar* (2) and *Abdul Aziz Khan v. Appayasami Naicker* (3), referred to.

*Per* BURKITT, J., *contra*:—Whether or not in a properly framed suit tendering the amount due on the auction purchaser's mortgage and the amount paid by the auction purchaser for the property bought by her the plaintiff could recover possession of the property mortgaged, in the present suit, which was framed as a suit for the recovery of unpaid purchase money, no decree for the payment of the amounts due on the prior mortgages could be passed. A notification by a Court executing a decree for sale of immovable property that the property about to be sold is incumbered does not guarantee that the incumbrances notified are valid incumbrances or that they are the only incumbrances on the property; nor in this case was there anything in the conduct of the auction purchaser which estopped her from denying the validity of the prior mortgages. The auction purchaser was entitled to retain the benefit of the bargain which she had secured.

THE facts of this case are as follows:—

The late Raja Khairati Lal was the owner of considerable property in the district of Bareilly. He died in the year 1866 leaving his widow Rani Hulas Kunwar and a daughter Rani Achhan Kunwar him surviving. Rani Achhan Kunwar was married to Raja Lalji, and by him had two sons, namely, the plaintiff Raja Inayat Singh, and Kunwar Shamsheer Bahadur, the latter of whom died on the 9th July 1899. On the 25th of May 1877, Raja Lalji, purporting to act as attorney of Rani Hulas Kunwar, Rani Achhan Kunwar and Raja Inayat Singh,

(1) (1887) L. R., 14 I. A., 77. (2) (1887) L. R., 14 I. A., 84.

(3) (1903) L. R., 31 I. A., 1.

and also on his own behalf, executed a mortgage in favour of Mohan Lal, Mauji Ram and Govind Prasad hypothecating thirteen villages which had belonged to Raja Khairati Lal to secure a principal sum of Rs. 20,000. On the 2nd of December 1877, Raja Lalji, purporting to act on behalf of the same persons, executed in favour of the "same mortgagees another mortgage affecting six of the villages which had belonged to Raja Khairati Lal, including Girdharipur, which was comprised in the last mentioned mortgage, to secure a principal sum of Rs. 10,000 and interest. Rani Hulas Kunwar died on the 22nd of June 1888. On the 17th of October 1878 Rani Achhan Kunwar, in conjunction with Raja Lalji and Raja Inayat Singh, executed in favour of Musammat Intizam Begam a mortgage of nine of the villages which Raja Lalji had purported to mortgage to Mohan Lal and his co-mortgagees to secure a principal sum of Rs. 30,000 and interest. On the 27th of January 1887, Musammat Intizam Begam instituted a suit for recovery of the amount due on her mortgage; on the 25th of February 1889, she obtained a decree for sale, and on the 30th of June 1889, an order absolute for sale of the mortgaged villages. Before the sale was carried out, *i.e.*, on the 2nd of June 1890, Mohan Lal, and his co-mortgagees brought a suit for sale of the villages comprised in their mortgage of the 2nd of December 1877, and obtained a decree for sale from the Court of the Subordinate Judge of Bareilly on the 9th of June 1892; but this decree was set aside by the High Court on appeal, and the suit of the plaintiffs dismissed, on the ground that Rani Hulas Kunwar had not given any authority to Raja Lalji to execute the mortgage. The decision of the High Court was confirmed by the Privy Council on the 27th of July 1898. On the 24th of May 1894 a suit for sale was instituted by the mortgagees of the mortgage of the 25th of May 1887: but that suit also was dismissed by the Court of first instance and by the High Court on appeal upon the ground that Raja Lalji had no authority to execute the mortgage. Meanwhile Musammat Intizam Begam proceeded with the execution of her decree, and on the 2nd of March 1894 a proclamation of sale was drawn up, in which it was stated that the property would be

1904

INAYAT  
SINGH  
v.  
IZZAT-UN-  
NISSA  
BEGAM.

1904

INAYAT  
SINGH  
v.  
IZZAT-UN-  
NISSA  
BEGAM.

sold subject to the two mortgages of the 25th of May 1877 and the 2nd of December 1877, there being at that time nothing to indicate that these were not valid incumbrances. The decree-holder representing that the property was so heavily mortgaged that purchasers might not be forthcoming, obtained leave to bid, and at the sale, which took place on the 20th of April 1894, purchased eight out of the nine villages mortgaged to her for Rs. 64,100. On 29th of June 1894 this sale was confirmed, and Musammat Intizam Begam got possession of the property purchased. Intizam Begam died in 1897 and Achhan Kunwar on the 7th of June 1898. After the two mortgages of 1877 had been declared invalid, Raja Inayat Singh applied to the persons in possession of the mortgaged property for payment of the amount due thereunder, and when payment was refused brought the present suit on the 8th of July 1901. This suit was to recover from the representatives of Intizam Begam the amounts due on the two mortgages of 1877 as unpaid purchase money. In paragraph 12 of his plaint the plaintiff stated:—"The real purchase money of the property sold at auction as aforesaid and which the defendants purchasers ought to have paid was the amount paid by the purchaser on the completion of the sale, together with the amount which was due under the above mentioned deed, dated respectively the 25th of May 1877, and the 2nd of December 1877, subject to which incumbrances the sale was made, and as the decree of Her Majesty in Council and the decree of the Hon'ble High Court above mentioned have exonerated the property purchased at auction, and now in the possession of the defendants, from the liability to pay the amount charged thereupon by the aforesaid deeds \* \* \*

\* \* \* the abovenamed defendants had not to pay the same, nor will they ever be called upon to pay the same." And the first prayer in the plaint was "that it be declared and decreed that a sum of Rs. 1,61,776-11-0 or any less sum that the Court may find due is payable to the plaintiff as part of the unpaid vendor's purchase money, by the defendants, and that it be declared and decreed that the plaintiff has a lien for such amount against the villages purchased at auction and in the possession of the defendants." The main defence to the suit

was that by reason of the auction sale Rani Achhan Kunwar and the plaintiff ceased to have any interest in the property sold, and the purchasers became the absolute owners; and that the fact that the property was sold subject to the incumbrances created by Rani Achhan Kunwar and the plaintiff, which incumbrances were afterwards declared to be invalid, would not entitle the plaintiff to claim the amount of these incumbrances from the auction purchasers.

The Court of first instance acceded to the contention of the defendants and dismissed the suit. The plaintiff thereupon appealed to the High Court.

Pandit *Sundar Lal* (with whom Dr. *Satish Chandra Banerji*) for the appellant. On the 20th of April 1904, when Intizam Begam purchased the property in question, it was supposed to be subject to the two prior mortgages of 1877. Raja Inayat Singh had already attached the mortgage of the 2nd of December 1877 in his defence to the mortgagees' suit filed in 1890, on the ground that Raja Lalji had no authority to execute it. Though the Court of first instance had overruled that contention, the matter was pending in appeal before the High Court. The validity of the other mortgage depended upon the validity of the same power of attorney. Intizam Begam represented that these two mortgages were subsisting mortgages on the property proposed to be sold, and got this fact notified to all the purchasers. She obtained leave to bid on the representation that the property was heavily incumbered, and then herself purchased the property. The Court was under the impression that the two mortgages were good mortgages on the property, and that the equity of redemption only was being sold. The judgment-debtor and the auction purchaser were also under the same impression, and the Court confirming the sale upheld it on the same ground. The real price of the property was the price bid at the sale plus the burden of the two mortgages. The auction purchaser had to discharge that burden by paying the amount due either to the mortgagors or to the mortgagees. The purchaser strictly purchased only the equity of redemption, and now that it has turned out that these two mortgages are invalid, the defendants cannot retain the corpus without paying its full

1904

---

INAYAT  
SINGH  
v.  
IZZAT-UN-  
NISSA  
BEGAM.

---



1904

INAYAT  
SINGH  
v.  
IZZAT-UN-  
NISSA  
BEGAM.

value. The plaintiff is entitled in equity to recover from the defendants the amount which the purchaser would have had to pay to the prior mortgagees if their mortgages had been enforceable. It would be inequitable and unjust to permit a creditor to have it proclaimed that the judgment-debtor's property was subject to heavy incumbrances, to obtain leave to bid on the assurance that such incumbrances existed, and to buy the property himself for a very small price in consequence. The representation made by Musammat Intizam Begam was a material misrepresentation, and the defendants cannot be allowed to reap the benefit of it. *Abdul Aziz Khan v. Appayasami Naicker* (1), *Blount v. Blount* (2) and *Davy v. Barber* (3) were cited. At a private sale, in the absence of a contract to the contrary, the purchaser of the equity of redemption is under an obligation to discharge the prior mortgage and to indemnify the mortgagor against any loss he might sustain in the event of his being compelled to pay such mortgage himself (*Ashburner* on mortgages, p. 374). There is no reason why the same principal should not also be applied to public sales.

Mr. *Abdul Majid* (with whom *Babu Lalit Mohan Banerji*) for the respondents. The suit as framed is for the recovery of an unpaid vendor's lien by enforcement of a charge. The vendor at a public auction sale under the Code of Civil Procedure has no such lien. The Court, and not the judgment-debtor, sells the property, though by process of law the interests of the judgment-debtor pass at such sale he is not a vendor in law. The purchaser acquires title adversely to the judgment-debtor, *Dinendro Nath v. Ram Coomar* (4). The price paid at such auction sale is the bid by the purchaser, and the amount of a prior incumbrance notified in the sale proclamation is no part of such price: See the Code of Civil Procedure, sections 204, 306, 307, 308, 309, 310A. An auction purchaser is entitled to any benefit which might accrue to him by reason of any notified incumbrance turning out afterwards to be not good, just in the same way as he would have to bear the burden of any other incumbrance not notified which might subsequently be discovered.

(1) (1898) I. L. R., 22 Mad., 110.

(1903) L. R., 31 I. A., 1.

(2) (1748) 3 Atkyns, 636.

(3) (1742) 2 Atkyns, 489.

(4) (1881) L. R., 8 I. A., 65, at p. 75.

He takes both the risk and benefit. Suppose that, instead of the mortgages proving invalid, the mortgagees had allowed their claims to become time-barred, or had compounded with us—could the mortgagors judgment-debtors have claimed a lien against us? The principle of the ruling in *Kashi Nath v. Beni Prasad* (1) applies. There is no precedent for a suit like this. No case of misrepresentation was set up in the Court below, and we had no opportunity of meeting such a case. The money claimed is not by way of compensation, and a mere claim for damages could give rise no charge. The plaintiff's remedy, if any, was to have the sale set aside.

Pandit *Sundar Lal* in reply.

BURKITT, J.—This is an appeal against a decree of the learned Subordinate Judge of Bareilly dismissing the plaintiff's suit.

The suit was one against vendees to recover unpaid purchase money. The prayers for relief as set forth in the plaint are (1) for a declaration that a sum of Rs. 1,61,776-11-0 (or any less sum the Court finds due) is "payable to the plaintiff as part of the unpaid vendor's purchase money by the defendants," who are described as the owners and in possession of villages of which they had purchased the equity of redemption; (2) for a declaration that the plaintiff had a lien for the said amount against the villages now in the possession of the defendants; and (3) for an order for sale of the villages if the amount found due be not paid.

The facts on which the prayers for these reliefs depend are briefly as follows:—

One Musammat Intizam Begam, now deceased, whose representatives and transferees are the defendants respondents, obtained a decree for sale on a mortgage held by her bearing date October 17th, 1878, from Raja Lalji and others, now represented by the plaintiff appellant. Musammat Intizam Begam preferred a suit on her mortgage in January 1887. A decree for sale in default of payment was passed on the 25th February 1889. In the sale proclamation it was notified that there were two mortgage incumbrances, aggregating Rs. 30,000,

(1) Weekly Notes, 1904, p. 32.

1904

INAYAT  
SINGH  
v.  
IZZAT-UN-  
NISSA  
BEGAM.

1904

INAYAT  
SINGH  
v.  
IZZAT-UN-  
NISSA  
BEGAM.

Burkitt, J.

existing on the property about to be sold. The Court gave permission to the decree-holder to bid at the auction on her representation that on account of the heavy incumbrances bidders might not come forward. In the result, at the auction sale held on April 20th, 1894, Musammat Intizam Begam purchased for Rs. 64,100 eight out of the nine villages put up for sale, and the sale was confirmed by the Collector (to whom the execution proceedings had been transferred under sections 320 *et seqq* of the Code of Civil Procedure) on June 29th, 1894.

There is no information on the record as to whether the sum of Rs. 64,100, the price paid by Musammat Intizam Begam for eight villages, and of Rs. 7,100 paid by the highest bidders, Abdul Kayum and Abdul Hafiz, for the ninth village, sufficed to discharge the mortgage (admittedly a good and valid incumbrance) held by Musammat Intizam Begam, and whether anything remained to be handed over to the mortgagors (now represented by the plaintiff appellant here) after the decree-holder's claim had been satisfied.

Nearly seven months after the confirmation of the sale it was decided by this Court on January 15th, 1895, that one of the two mortgages mentioned above, a mortgage for Rs. 10,000 bearing date December 2nd, 1877, was invalid, having been executed by a person not authorized in that behalf by the parties in whose names he professed to act. The decision of this Court was on appeal affirmed by their Lordships of the Privy Council (1) on June 27th, 1898. Similarly, as to the second mortgage (for Rs. 20,000, bearing date May 25th, 1877) which was notified in the sale proclamation in the present case, it was decided by this Court on appeal on May 3rd, 1899 (affirming the decree of the Court of first instance, dated June 5th, 1896) that that mortgage also was invalid, and did not create any incumbrance on the property which it purported to affect. In consequence of the two decrees of this Court mentioned above, namely, those of January 16th, 1895, and May 3rd, 1899, the purchasers (Musammat Intizam Begam as to eight villages, and Abdul Kayum and Abdul Hafiz as to the ninth) were able to

(1) (1898) L. R., 25 I. A., 183. *Sham Sunder Lal v. Achhan Kunwar.*

obtain possession of those villages without having to discharge the incumbrances which had been notified in the sale proclamation.

Thereupon the plaintiff Raja Inayat Singh, son of the late Rani Achhan Kunwar (who was the principal defendant in the suits mentioned above), instituted the present suit in July 1901 against the representatives of Musammat Intizam Begam, and another suit against Abdul Kayum and Abdul Hafiz, to compel them to pay to him, as unpaid purchase money, the sums which the invalid mortgages of May 25th, 1877, and of December 2nd, 1877, had purported to secure. In the 12th paragraph of the plaint the plaintiff alleges that "the real purchase money of the property sold at auction as aforesaid and which the defendants purchasers *ought to have paid* was the amount paid by the purchaser on the completion of the sale *together* with the amount which was due under the above mentioned deeds, dated respectively the 25th May 1877 and the 2nd December 1877, subject to which incumbrances the sale was made," and urges that as in consequence of the decrees mentioned above the defendants are now in possession of the property free from any liability to pay the amount of the above mentioned mortgages, and "had not to pay the same nor will they ever be called upon and made to pay the same, and therefore the amounts thereof, *viz.*, Rs. 1,61,776-11-0, are now due to the plaintiff as unpaid vendor's purchase money." In the 21st paragraph of his plaint the appellant sets forth as the date of the accrual of his cause of action the dates on which Her late Majesty in Council on July (a mistake for June) 27th, 1898, and this Court on May 3rd, 1899, exonerated the defendants from payment of the charges created by the mortgages of the 2nd December 1877 and of May 25th, 1877.

In their written statement the defendants admitted the facts as to the preceding litigation stated by the plaintiff. In paragraph 5 they allege that in consequence of the purchase at auction on April 20th, 1894, "the plaintiff or his ancestor had no longer any right in the said property, and the purchaser has become the absolute owner of the property purchased by him" (evidently a mistranslation for 'her'). The sixth and seventh paragraphs of the written statement are as follows:—

1904

INAYAT  
SINGHv.  
IZZAT-UN-  
NISSA  
BEGAM.

Burkitt, J.

1904

INAYAT  
SINGH  
v.  
IZZAT-UN-  
NISSA  
BEGAM.

Burkitt, J.

6. "The allegation of the plaintiff that the sum of Rs. 1,61,776-11-0 is due and is payable to the plaintiff as unpaid purchase money is entirely wrong. No private sale was ever made by Rani Achhan Kunwar or by the plaintiff to the ancestor of the defendants, and no contract or agreement was made between the parties for the payment of any money. No contract for the payment of any money was or could be entered into between the auction purchaser and the ancestor of the plaintiff or the plaintiff's judgment-debtors. The plaintiff is not entitled to get the money which has been notified." By this last sentence the defendants refer to the incumbrances of Rs. 30,000 notified at the auction sale on April 20th, 1894.

7. "The fact of the properties being sold subject to the incumbrances, if any, created by Rani Achhan Kunwar and the plaintiff, and which incumbrances were afterwards declared invalid, would not entitle the plaintiff to claim the amount of these incumbrances from the auction purchaser."

On these pleadings the parties went to trial. The plaintiff claimed as unpaid purchase money the amount of the two fictitious mortgages mentioned above, while the defendants denied that they were liable to pay. The suit was fought out in the Court of first instance as one to recover "unpaid purchase money," and it was so understood by the learned Subordinate Judge, who dismissed it, holding that "the rule of a vendor's lien for the unpaid purchase money does not apply to the case of a sale *in invitum*, and this suit therefore fails." The plaintiff appealed to this Court, contending in his memorandum of appeal (1) that the Subordinate Judge was wrong in holding that "the doctrine of unpaid vendor's lien" does not apply to sales in execution of decrees of Courts; (2) "that the consideration for the sale was the price paid at the sale *plus* the money due to the prior mortgagees whose mortgages the purchaser had himself (*sic*) virtually acknowledged to be subsisting and which he (*sic*) was aware he (*sic*) would have to satisfy;" (3) "that the plaintiff was in law and equity entitled to a charge or lien on the property sold for the amount which the respondent purchaser was to have paid and from payment of which they (*sic*) were exonerated by decrees which declared the



prior mortgages on the property to be void." This memorandum of appeal, it will be observed, again raises only the question of unpaid purchase money.

At the first hearing of this appeal before the learned Chief Justice and myself the learned advocate for the appellant contended that the view taken by the lower Court was wrong, that the price at which Musammat Intizam Begam purchased the property was the amount of her bid, Rs. 64,100, *plus* the sums then believed to be due on two mortgages which afterwards were discovered to be void. That amount, the learned advocate contended his client was entitled to recover as unpaid purchase money from the respondents, the representatives of the auction purchaser. The learned advocate admitted he was unable to cite any reported case in point. On the other hand the learned advocate for the respondents contended, and in my opinion conclusively showed by referring to the use of the words "purchase money" in sections 294, 306, 307, 308, 309 and 310-A of the Code of Civil Procedure that the words 'purchase money' import only the sum offered by the highest bidder and accepted by the Court conducting the sale, and do not include the amount of any incumbrances which the Court acting on the best information it has been able to obtain, has at the time of sale notified as existing burdens on the property put up for sale.

In reply the learned advocate for the appellant abandoned the claim for "unpaid purchase money," but claimed to recover the amounts of the two invalid mortgages as being money due in equity from the respondents to the appellant, as in fact, to use the learned advocate's own words, "money which the defendants ought to pay."

In consequence of the difficulty of the case and for other reasons the appeal was re-heard before a larger Bench.

In order to explain why I am still unable to concur in the opinions of the other members of this Bench it is necessary for me briefly to refer to the two void mortgage bonds of December 2nd and May 25th, 1877. They both were prior in date to the Musammat Intizam Begam's mortgage—admittedly valid—which bears date of October 17th, 1878. She was the first to

1904

INAYAT  
SINGH  
v.  
IZZAT-UN-  
NISSA  
BEGAM.

Burkitt, J.

1904

INAYAT  
SINGH

v.

IZZAT-UN-  
NISSA  
BEGAM.*Burkitt, J.*

sue, her plaint having been filed on January 27th, 1887. She obtained the usual mortgage decree for sale in default of payment, which was affirmed by this Court on the 25th February 1889. She applied for execution by sale on June 30th of the same year, and eventually at an execution sale held on April 20th, 1894, she (having obtained permission of the Court under section 294 of the Code) purchased for Rs. 64,100 eight out of the nine villages which had been mortgaged to her, and that sale was confirmed on June 29th of the same year.

As to the other two mortgages, the first put into Court was that of December 2nd, 1877. A suit for sale was instituted on it on June 2nd, 1890. To that suit Musammat Intizam Begam was not a party. The claim was decreed in favour of the alleged mortgagee plaintiff by the Court of first instance on January 9th, 1892, but was dismissed by this Court on appeal, as already mentioned, on January 15th, 1895, *i.e.*, nearly nine months subsequent to Musammat Intizam's purchase on the 20th April, 1894, and some seven months after the confirmation of that sale on June 29th of the same year. This then was the first intimation that Musammat Intizam Begam had that the Rs. 10,000 incumbrance which the instrument of December 2nd, 1877, purported to create was not a valid incumbrance.

No suit was instituted on the mortgage of May 25th, 1877 (the Rs. 20,000 mortgage) till May 24th, 1894, *i.e.*, more than a month after the date of Musammat Intizam Begam's purchase on April 20th of that year. In this suit an order was passed under section 32 of the Code adding Musammat Intizam as a party defendant (probably because of her purchase on April 20th). This order was passed on June 20th of the same year. Whether it was served on her before the confirmation of the sale on June 29th it is impossible to say, the record having been weeded out and destroyed. Eventually this suit was dismissed by this Court on May 3rd, 1899, affirming the decree of the Subordinate Judge of June 5th, 1896. This latter decree was the first intimation Musammat Intizam had that the mortgage of May 25th, 1877, created no valid incumbrance.

Now the grounds on which, as I understand, it is sought to fix the respondents with a liability in equity to pay the plaintiff

the amount of these invalid incumbrances are, firstly, [that they formed part of the purchase money at the sale of April 20th, 1894. This contention I cannot accept. I am clearly of opinion on a review of the sections of the Code of Civil Procedure mentioned at an earlier portion of this judgment, that those incumbrances formed no part of the purchase money. No doubt that which Musammat Intizam Begam purchased, and that which was sold, and that which she believed she was purchasing, was the equity of redemption of the eight villages. She purchased those villages subject to any existing incumbrances. The execution Court when selling immovable property does not guarantee that the incumbrances notified in the sale proclamation are valid charges or that they are the only incumbrances chargeable on it. If in this case it had turned out that there were other incumbrances, not notified at the sale, affecting the property, the vendee could not have obtained possession without first discharging them. Here the case is the opposite, as the incumbrances notified at the sale which at the date of the sale everyone, including Musammat Intizam Begam, believed, and for good reasons, to be valid incumbrances, turn out to be void. This fact was discovered in one case (the Rs. 10,000 mortgage) some nine months and in the other (the Rs. 20,000 mortgage) more than two years after Musammat Intizam Begam's purchase of April 20th, 1894. Does this fact then give the plaintiff a right to put himself into the shoes of the holders of two mortgages which the Courts have declared to be void, and to call on the respondents as representatives of the auction purchasers to pay to him the sums which Raja Lalji had borrowed on invalid mortgages from Mohan Lal, Mahngi Ram and Gobind Prasad? I cannot see that in equity he is entitled to succeed in such a claim. No doubt the auction purchaser made a lucky purchase. Musammat Intizam Begam expected to have to, and no doubt was prepared to, pay off any valid incumbrances existing on the eight villages she purchased. It turns out that there was no valid incumbrances, and in my opinion she and her representatives are not liable to be deprived of the fruits of her bargain, at least in a suit framed like the present suit. It is perhaps possible that in a properly framed suit tendering payment of the

1904

INAYAT  
SINGHv.  
IZZAT-UN-  
NISSA  
BEGAM.*Burkitt, J.*

1904

INAYAT  
SINGHv.  
IZZAT-UN-  
NISSA  
BEGAM.

Burkitt, J.

Rs. 64,100, and of the amount due on Musammat Intizam Begam's mortgage of October 17th, 1878, the plaintiff *may* be able to recover possession of the eight villages sold on April 20th, 1894. But the present suit is, I think, misconceived. I would add that if no suit had been instituted by the alleged mortgagees to enforce payment of the sums which purported to be secured by the instruments of May 25th and December 2nd, 1877, and the latter had been notified in the sale proclamation in Musammat Intizam Begam's suit, and if she after her purchase in a suit for possession on her purchase of April 20th, 1894, had been successful in establishing the invalidity of those two mortgages, could the plaintiff have successfully claimed from her the amount of the two invalid mortgages on the ground that as auction purchaser she was bound to pay off the invalid charges notified in the sale proclamation? I think not; and think it makes no difference that, after the sale to Musammat Intizam Begam had taken place, the plaintiff's predecessors in title succeeded in establishing the invalidity of those two instruments. It surely is open to an auction purchaser to dispute successfully the validity of charges notified at the auction sale without thereby rendering himself liable to pay those charges to the mortgagor. This suit seems to me to be simply one to compel the representatives of the auction purchaser to redeem two mortgages which the Lords of the Privy Council and this Court have declared to be invalid.

Then the conduct of Musammat Intizam Begam in the matter of the notification of the two invalid mortgages was animadverted on, and it was argued that she was in some way estopped by her conduct. Now as to the notification of incumbrances at a sale of immovable property it is the duty of the Court to obtain from all available sources a list of existing incumbrances, but the Court does not and cannot guarantee that the list it publishes contains all existing incumbrances or that the incumbrances it notifies are valid. It gives to intending bidders the best information it can procure and leaves the bidders to take the risk. The preparation of this list is not the act of the parties, though the Court no doubt may and does obtain information from them. In this case the list prepared by the

Court showed incumbrances to the amount of Rs. 92,000. To this an objection was raised on behalf of Musammat Intizam Begam, who through her pleader informed the Court that the real incumbrances were only Rs. 30,000. The Court accepted this and struck out the Rs. 62,000. The history of the litigation about this sum of Rs. 62,000 will be found in the judgment of their Lordships of the Privy Council in the case of *Lala Amar Nath Sah v. Rani Achan Kuar* (1). If Musammat Intizam Begam wanted to purchase the property cheap, she was unwise in having that item struck out of the list of incumbrances. I cannot see that by her action in this matter she incurred an implied liability to pay the Rs. 30,000 in any case, whether the two mortgages were valid or not. Nor can I see where the estoppel comes in. She did not by any act of hers or of her agent induce any person to change his position injuriously to himself. Again, strenuous arguments were addressed to us as to the language used by Musammat Intizam Begam when she applied for leave to bid at the sale as permitted by section 294 of the Code of Civil Procedure. It was practically contended that she thereby guaranteed the existence and validity of the mortgages and undertook to pay them in any event if she were declared to be the purchaser at the sale. Her petition for leave to bid (No. 8 of the record) was presented on September 10th, 1892. It is in these words: "In the above case the decree is for a considerable amount. Perhaps there might not be forthcoming any purchaser, for the property is incumbered with heavy debts. Formerly this decree-holder obtained permission from the Court twice. As fresh notifications have been issued this application is made, and it is prayed that permission to purchase the property on presentation of a receipt for the amount due under the decree (*sic*)."

Now all the statements made in that petition were at its date wholly and literally true. On the 9th of June 1892, the Subordinate Judge of Bareilly had found in favour of the mortgage of December 2nd, 1877, and had given a decree for sale on foot of it. It was not till January 15th, 1895 (nine months after the sale of April 20th, 1894, that this Court reversed that

(1) (1892) L. R., 19 I. A., 196.

1904

INAYAT  
SINGH

v.  
IZZAT-UN-  
NISSA  
BEGAM.

Burkitt, J.



1904

INAYAT  
SINGH

v.

IZZAT-UN-  
NISSA  
BEGAM.

Burkitt, J.

decree. So in September 1892, Musammat Intizam Begam had *judicial authority* for believing that the mortgage of December 2nd, 1877, was a valid and binding instrument. As to the other mortgage, that of May 25th, 1877, it was not put in suit till May 1894. So in September 1892, Musammat Intizam had no reason to believe it to be other than a good and binding mortgage. I cannot understand how on the facts just detailed I can be called on to hold that by reason of her petition of the 10th September 1892, Musammat Intizam Begam undertook *in any event* to pay the amounts supposed to be secured by the two invalid instruments in case she should be the purchaser at the impending auction sale. She took the risk of having to pay, and no doubt was prepared to pay those incumbrances, if valid; and as they turned out to be void, I fail to see why in a suit like the present her representatives should be compelled to discharge them. We are familiar with the maxim *caveat emptor*, but in this suit I would vary it by suggesting *gaudeat emptor*.

The reasons given by the Collector in his order of June 29th, for rejecting an objection to the confirmation of the sale filed on May 19th, 1894, are in my opinion immaterial in this suit. The objection had reference only to the price realized at the sale. Nothing was said as to the validity of the two mortgages, which every one *then* believed to be binding instruments. The Collector (like everyone else) believed those bonds to be good, and therefore held that the objectors had been lucky in getting so good a price.

I would also point to the extraordinary nature of the claim made by the plaintiff. The two invalid mortgages purported to affect 18 villages. Out of them Musammat Intizam Begam purchased only eight, and yet the plaintiff claims to recover from her representatives *the whole sum* with compound interest which those invalid instruments purported to secure. Such a claim is absurd, and all the more so seeing that nine out of the villages affected by those instruments are now admittedly in the hands of the plaintiff appellant. Finally, I reiterate my opinion that the plaintiff appellant has misconceived his remedy, if he have any. If it be considered inequitable that the respondents should continue to enjoy

the fruits of Musammat Intizam Begam's lucky purchase, then possibly the appellant's true remedy is by a suit for recovery of possession of the eight villages, as suggested at an earlier portion of this judgment.

I deeply regret that I have the misfortune to be unable to concur in the opinions to the contrary which, having had an opportunity of perusing the judgment of the learned Chief Justice, are, I understand, entertained by him and by my learned brother Blair.

I would affirm the decree of the lower Court and would dismiss this appeal with costs.

STANLEY, C. J.—The question raised in this appeal is one of novelty and considerable difficulty. The facts are as follows:—The late Raja Khairati Lal was the owner of considerable property in the district of Bareilly. He died in the year 1866 leaving his widow Rani Hulas Kunwar and a daughter Rani Achhan Kunwar him surviving. Rani Achhan Kunwar was married to Raja Lalji, and by him had two sons, namely, the plaintiff Raja Inayat Singh and Kunwar Shamsheer Bahadur, the latter of whom died on the 9th of July 1889. On the 25th of May 1877, Raja Lalji, purporting to act as attorney of Rani Hulas Kunwar, Rani Achhan Kunwar and Raja Inayat Singh, as also on his own behalf, executed a mortgage in favour of Mohan Lal, Mauji Ram, and Govind Prasad, hypothecating 13 villages which had belonged to Raja Khairati Lal to secure a principal sum of Rs. 20,000. Again on the 2nd of December 1877, Raja Lalji, purporting to act on behalf of the same persons, executed in favour of the same mortgagees another mortgage affecting 6 of the villages which had belonged to Raja Khairati Lal, including Girdharipur, which was comprised in the first mentioned mortgage, to secure a principal sum of Rs. 10,000 and interest. Raja Lalji, as events proved, had no authority to execute either of these mortgages. At the date of their execution Rani Hulas Kunwar was alone entitled to the mortgaged property and Raja Lalji had no interest whatever in it. Rani Hulas Kunwar died on the 22nd of June 1878, whereupon her daughter Rani Achhan Kunwar succeeded to the property of Raja Khairati Lal. On the 17th of October 1878 she, in

1904

INAYAT  
SINGH  
v.  
IZZAT-UN-  
NISSA  
BEGAM.

1904

INAYAT  
SINGH  
v.  
IZZAT-UN-  
NISSA  
BEGAM.

Stanley, C.J.

conjunction with her husband and her son, the plaintiff, executed in favour of Musammat Intizam Begam a mortgage of 9 of the villages which Raja Lalji had purported to mortgage to Mohan Lal and his co-mortgagees to secure the principal sum of Rs. 30,000 and interest. Musammat Intizam Begam instituted a suit on the 27th of January 1887 for recovery of the amount due to her on foot of her mortgage, and ultimately, on the 25th of February 1889 obtained the usual mortgage decree, and on the 30th of June 1889 she obtained an order for sale of the mortgaged villages. Before any sale was carried out, namely, on the 2nd of June 1890, Mohan Lal and his co-mortgagees brought a suit for sale of the villages comprised in their mortgage of the 2nd of December 1877, and obtained a decree for sale in the Court of the Subordinate Judge of Bareilly on the 9th of June 1892; but this decree was set aside by the High Court on appeal, and the suit of the plaintiffs dismissed on the 15th of January 1895, on the ground that Rani Hulas Kunwar had not given any authority to Raja Lalji to execute the mortgage. The decision of the High Court was confirmed by the Privy Council on the 27th of July 1898. Pending these proceedings, namely, on the 24th of May 1894, Govind Prasad and his co-mortgagees instituted a suit for recovery of the amount due to them on foot of the mortgage of the 25th of May 1877. But this suit was also dismissed by the Court of first instance, and also by the High Court on appeal, on the ground that Raja Lalji had no authority to execute the mortgage. Pending the proceedings taken on foot of the mortgage of the 2nd of December 1877, in which the validity of that mortgage was impeached, Musammat Intizam Begam proceeded with the execution of her decree, and after an investigation of the incumbrances affecting the property a sale proclamation was prepared and issued, pursuant to the provisions of section 287 of the Civil Procedure Code. This proclamation is dated the 2nd of March 1894, and in the schedule to it it is distinctly stated that the property is and will be sold subject to the two mortgages of the 25th of May 1877 and the 2nd of December 1877, and that the amounts due on foot of these mortgages respectively for principal are Rs. 20,000 and Rs. 10,000. In the body of the proclamation is

the following statement :—“ The sale will be of the property of the judgment-debtor above named, *as mentioned in the schedule, and the liabilities and claims attaching to the said property*, so far as have been ascertained, *are those specified in the schedule against each lot.*” Then in the schedule under the heading “Detail of incumbrances, if any, to which the property is liable as far as they have been ascertained by the Court,” are set forth the liabilities. The words are “The liabilities are as follows,” and underneath are set forth the two mortgages in question, with the names of the mortgagors, the mortgagees, and the principal amounts due on foot of them. It would appear that as originally settled incumbrances to the extent of Rs. 92,000 were inserted in the sale proclamation, but upon the representation of Mr. Bamanji, pleader for Musammat Intizam Begam, the amount was reduced to Rs. 30,000. On the file is a statement of Mr. Bamanji, made on the 6th of January, 1893, in the following words :—“ My plea is to the effect that Rs. 30,000, the amount of this decree, entered as hypothecation lien, may be excluded, and that Rs. 32,000 entered as due to Moti Ram Sahu may also be taken out, *i.e.*, out of Rs. 92,000, the whole of the hypothecation lien, Rs. 62,000 have been entered by a mistake. This sum may be excluded, and the balance of Rs. 30,000, *the correct amount of the hypothecation lien, may be entered in the notification.*” Up to this time, it will be noted, that Rani Achhan Kunwar had been unsuccessful in her impeachment of the mortgage of the 2nd of December 1877. The mortgagees had obtained a decree against her on foot of that mortgage on the 9th of January 1892, and it was not until the 15th of January 1895, that that decree was reversed and the mortgagees’ suit dismissed. So far, therefore, as was known at the time, the mortgages of the 25th of May 1877 and the 2nd of December 1877 were valid and subsisting mortgages, but litigation in regard to the last mentioned mortgage was proceeding. There can be no manner of doubt that what the Court intended to sell and expressly offered for sale was the equity of redemption in the property, and that an intending purchaser must have been aware that he could acquire such equity only. This being the state of things, Musammat Intizam Begam proceeded

1904

INAYAT  
SINGHv.  
IZZAT-UN-  
NISSA  
BEGAM.

Stanley, C.J.

1904

INAYAT  
SINGH

v.

IZZAT-UN-  
NISSA  
BEGAM.

Stanley, C.J.

with the execution of the decree, and she obtained liberty from the Court to bid for the property on the representation that the property was so heavily mortgaged that purchasers would not readily be found. She filed an application on the 10th of September 1892 in which she asked for permission to purchase on the ground that her decree was for a considerable amount, and that "perhaps there might not be forthcoming any purchaser, for the property is incumbered with heavy debts." On this representation she obtained leave to bid, and at the sale, which was held on the 20th of April 1894, she purchased all the villages offered for sale, with the exception of one village. It will be remembered that her pleader Mr. Bamanji in the statement which he presented to the Court on the 6th of January 1893 on her behalf said that the correct amount of the hypothecation lien was Rs. 30,000, and that this amount might be entered in the sale notification. Musammat Intizam Begam was on the 20th day of June 1894 added as a party to the suit which had been instituted on foot of the mortgage of the 25th of May 1877; but we have been unable to discover when the summons to appear in that suit was served upon her. That portion of the record appears to have been destroyed. Rani Achhan Kunwar objected to the carrying out of the sale on the ground that the officer conducting the sale stated when selling that there were loans amounting to Rs. 30,000 on the villages taken together, but her objection was disallowed on the 29th of June 1894. The Collector in his order disallowing the objection says: "*It was distinctly stated in the sale proclamations that there was a lien of Rs. 10,000 on Girdharipur and of Rs. 20,000 on the other villages proposed for sale. Even supposing the officer conducting the sale to have stated when selling that there were liens amounting to Rs. 30,000 on the villages taken together, I do not see how this would affect the prices bid for each village, and each has been put up separately. Intending purchasers would surely consult the published notification for details before bidding. Then, as to the value estimated, I do not see that the Court conducting the sale is bound to make any estimate, or rather to publish any. It makes an estimate merely to satisfy itself whether sale can be*



awarded or not. It is bound to notify such particulars as the Government revenue *and the liens because they are necessary to enable purchasers to know what they are bidding for, and in this instance the price realized (Rs. 71,200) is, considering the lien of Rs. 30,000 plus interest, a very good one, and it is nonsense for the judgment-debtors to complain of it.*" (The italics are mine.) Now it is obvious that the Court firmly believed that the property was subject to the mortgages mentioned in the proclamation, and that the purchasers were purchasing the property subject to them. What was offered for sale was the equity of redemption only. It is also clear that the decreeholder, Musammat Intizam Begam, at whose instance the sale took place, and her pleader represented to and led the Court to believe that these were valid and subsisting charges. On the strength of her allegation that there were existing charges, she got permission to bid. The sale to her was confirmed on the 29th of June 1894, in view of the existence of these incumbrances and she got possession of the property. The litigation in respect of the validity of the mortgages proceeded from Court to Court, in one case up to the Privy Council with the result, as we have stated, that Rani Achhan Kunwar was successful in establishing that they were not binding upon her, and having established this, she not unnaturally expected to obtain some fruits from her victory. Musammat Intizam Begam died in 1897, and Rani Achhan Kunwar died on 7th of June 1898. The defendants respondents are the heirs and donees of Musammat Intizam Begam, with the exception of the defendant No. 3, who is a purchaser of one village from the defendant No. 2. The plaintiff Raja Inayat Singh, who was the heir of Rani Achhan Kunwar, applied to the defendants for payment of the amount of the mortgages, but was promptly met with a refusal and told in effect that Musammat Intizam Begam having purchased the property subject to incumbrances which are proved to be valueless became and was entitled to the fruits of the successful litigation of Rani Achhan Kunwar, *i.e.*, to hold the property free from the incumbrances. That in fact Rani Achhan Kunwar was fighting the battle of Musammat Intizam Begam and spending money in litigation in her interests. The

1904

---

INAYAT  
SINGH  
v.  
IZZAT-UN-  
NISSA  
BEGAM.

---

Stanley, C.J.

1904

INAYAT  
SINGH

v.

IZZAT-UN-  
NISSA  
BEGAM.*Stanley, C.J.*

plaintiff thereupon brought this suit, which is for recovery of the amount of the money expressed to be secured by the two mortgages which have been found to be invalid as against the true owner of the mortgaged property. In the claim in paragraph 12 the plaintiff states that "the real purchase money of the property sold at auction as aforesaid and which the defendants purchasers ought to have paid was the amount paid by the purchaser on the completion of the sale, together with the amount which was due under the above-mentioned deeds, dated respectively the 25th of May 1877 and 2nd of December 1877, subject to which incumbrances the sale was made, and as the decree of Her Majesty in Council and the decree of the Hon'ble High Court above mentioned have exonerated the property purchased at auction, and now in possession of the defendants, from the liability to pay the amount charged thereupon by the aforesaid deeds . . . . . the above named defendants had not to pay the same, nor will they ever be called upon to pay the same." The first prayer in the plaint is that "it be declared and decreed that a sum of Rs. 1,61,776-11-0 or any less sum that the Court may find due is payable to the plaintiff as part of the unpaid vendor's purchase money by the defendants, and that it be declared and decreed that the plaintiff has a lien for such amount against the villages purchased at auction in the possession of the defendants" and for other relief. It is obvious that the plaintiff has asked for too much. If the defendants are under any liability in respect of the two mortgages in question, it is clear that they are only liable to pay the proportionate share of the amount secured by them which is properly attributable to the villages purchased by Musammat Intizam Begam. Musammat Intizam Begam only purchased eight villages, and her liability, if any, must be limited to the proportion of the shares of the mortgage debts attributable to those eight villages. The main defence to the suit is that by reason of the auction sale, Rani Achhan Kunwar and the plaintiff ceased to have any interest in the property sold, and the purchasers became the absolute owners, that the fact that the properties were sold subject to the incumbrances created by Rani Achhan Kunwar and the plaintiff, and which incumbrances

were afterwards declared invalid, would not entitle the plaintiff to claim the amount of these incumbrances from the auction purchasers. The learned Subordinate Judge yielded to this contention and dismissed the plaintiff's suit, and hence the present appeal.

The case is one of considerable difficulty, but after the best consideration which I have been able to bestow upon it, I have come to the conclusion that the decree of the Court below cannot be supported.

The case may be looked at from two points of view. First of all it may be contended that Musammat Intizam Begam having represented to the Court which was executing her decree that the property was subject to the two mortgages in question and having got liberty to bid for it upon this representation is estopped from denying the truth of the representation and must make it good to the best of her ability, that is, must pay to the judgment-debtor the amount of the incumbrances represented by her to be subsisting.

The other view is that Musammat Intizam Begam only acquired by her purchase the interest in the property which the Court purported to sell and which she understood she was purchasing, and so, having purchased from the Court property expressly stated to be subject to specified incumbrances, cannot hold the property without making good the amount of those incumbrances.

I shall now consider the case from the first point of view. Musammat Intizam Begam got liberty to bid for the property on the express representation that the two mortgages in question were subsisting mortgages. Her pleader in the statement which he presented to the Court informed the Court that Rs. 30,000 might be taken as the amount owing on foot of these mortgages. The Court acting on this, and it may be other information, issued the proclamation for sale in which it is stated in the most distinct manner that the property was subject to the two mortgage debts in question. Musammat Intizam Begam, at whose instance the sale took place, got leave to bid on the representation that the mortgages were subsisting mortgages, and on no other ground. The property, the

1904

INAYAT  
SINGH

v.

IZZAT-UN  
NISSA  
BEGAM.*Stanley, C.J.*

1904

INAYAT  
SINGH

v.

IZZAT-UN-  
NISSA  
BEGAM.*Stanley, C.J.*

subject matter of this appeal, was purchased by her. Furthermore, when the judgment-debtor objected to the sale on the ground that the price was inadequate, the Court disallowed the objection on the ground that having regard to the existence of the incumbrances in question the price was fair and reasonable. Can Musammat Intizam Begam or her representatives be heard to say that she was not liable to make good her representation? In my opinion she cannot. It no doubt may be the case that the representation was made by her and her pleader under the belief that it was true, and so was an innocent representation. It seems to me, however, that it is immaterial in a case of this kind whether the representation was innocently made or otherwise. It was intended that the Court should act upon the footing of its truth, and the Court did act upon that basis. She is now in my opinion estopped from taking advantage of the successful litigation of her judgment-debtor and from setting up the decisions of the High Court and the Privy Council, and relying on them as relieving her from the liability which she led the Court to believe she was undertaking when she purchased the property. It was the duty of the Court to sell the property to the best advantage. It was the duty of the decree-holder, particularly if she sought from the Court the privilege of bidding and purchasing, to abstain from making any representation, however innocent it might be, which would have the effect of damping the sale or otherwise injuriously affecting the interests of the judgment-debtor. It was on the representation that the property was burdened with the mortgages in question, that liberty was given to Musammat Intizam Begam to bid, and subject to these mortgages she purchased. She must in such a case, as it seems to me, make good her representation so far as it is possible for her to do so. Now it has been said that the judgment-debtor ought to have pressed the Court to postpone the sale pending the determination of the appeal proceedings. No doubt she would have been in a better position before us if she had done so, but she may well have thought that inasmuch as the property was being sold expressly subject to the incumbrances in question, if she was ultimately successful in her litigation, she would

without doubt be placed in the position of the mortgagees and obtain payment of the mortgage debts, as part of the consideration for the sale. It is said that the plaintiff has not in his plaint put forward any other claim than a claim for unpaid purchase money and that it is impossible to regard the sums stated to be secured by the two mortgages in question as purchase money, and that the suit must therefore fail. This appears to me to be a mere quibble over words. What he claims is that the defendants should fulfil the engagement which Musammat Intizam Begam impliedly entered into and pay the amount of the incumbrances subject to which she purchased the property, not, it is true, to the mortgagees of the property, but to the representatives of the mortgagor, who after protracted litigation established her title to the property free from these incumbrances. It is immaterial to the defendants to whom the money is paid. They are not asked to undertake any burden which Musammat Intizam Begam did not agree to undertake. If the transaction had been carried out by a deed of conveyance there can be no doubt but that provision would have been made in the deed for payment of the amount of the mortgage debts by the purchaser to the mortgagees if the mortgages were found to be binding on the judgment-debtor, but if they were found not to be so binding, then to the judgment-debtor. Unfortunately in these cases it is not usual to have any conveyance executed, the result being that the rights and liabilities of the purchasers must be ascertained so far as they can be from the records of the proceedings. In this case, as I have pointed out, the records disclose that a representation was made by the decree-holder, as also by her pleader, that the incumbrances in question existed and were valid incumbrances, which has turned out to be a false representation, and the only question is whether or not in a Court of equity she can be held bound to make good that representation. It is impossible in my opinion to reconcile the view taken by the Court below with any principle of equity or justice. It seems to me that a Court of equity can without offending any principle or rule of law give redress in such a case and prevent what would, from at least a common-sense point of view, be a palpable

1904

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INAYAT  
SINGH  
v.  
IZZAT-UN-  
NISSA  
BEGAM.

---

*Stanley, C.J.*



1904

JNAYAT  
SINGHv.  
IZZAT-UN-  
NISSA  
BEGAM.

Stanley, C.J.

wrong. My brother Burkitt in his judgment has commented at considerable length upon the frame of the suit, and appears to attach weight and importance to the fact that the plaintiff in his plaint seeks payment of the sum which is the subject matter of the suit as *purchase money*. He seems to think that if the suit had been differently framed, the plaintiff might possibly have been entitled to some redress. He does not, clearly at least, specify the nature of the redress. In a passage in his judgment he says that the plaintiff cannot get redress "in a suit framed like the present suit." Now it appears to me that it is not material in what language a plaintiff's claim is couched provided that he set forth his claim with sufficient clearness and state all the facts necessary, if proved, to entitle him to the relief which he claims. If the prayer of his plaint does not accurately describe the relief which he seeks, that appears to me to be no reason for refusing to give him redress. What the plaintiff really asked for is that the defendants as representing Musammat Intizam Begam should satisfy a claim which at the time of the purchase by her she held out to be an existing claim on the property and subject to which she purchased the property. The statement of facts contained in the plaint and the prayer to the plaint afford adequate means as it seems to me, for rendering justice. I may observe that the learned Subordinate Judge did not treat the claim as a claim for purchase money in the strict sense. In the course of his judgment he says:—"Now what does the plaintiff claim in this case? He claims the principal and interest of the aforesaid two prior mortgages proclaimed at the time of sale on the ground that the amount claimed by him *should be considered* as part of the purchase money which the purchaser undertook to pay to incumbrancers and which she had not to pay because the said prior mortgages were subsequently held to be invalid." He says in effect that the plaintiff's contention was that the amount of the mortgage debts proclaimed at the time of the sale as binding on the property *should be considered* as, not *was* part of the purchase money which the purchaser undertook to pay. It seems to me that there is no such vice in the pleading as prevents us from dealing with the case on broad

principles of equity, and that we are not hindered from applying to the case the principles of justice, equity and good conscience by any inapt or inappropriate words which may have been, I do not say have been, used by the plaintiff's pleader.

But there is the other point of view from which this case may be regarded, and that is this. The interest of the judgment-debtor which was put up for sale by the Court was the equity of redemption in the property. What the Court professed and purported to sell was this equity of redemption, and what it must be taken the decree-holder understood that she was purchasing was this equity, and this equity alone. In such a case the purchaser will not ordinarily get a greater interest than that which the Court intended to sell and that which the purchaser understood he bought. In the case of *Simbhu Nath Panday v. Golab Singh* (1) in which the father and head of a joint Hindu family mortgaged some joint family property, and in a suit by the mortgagee a decree for sale of the property was passed and it was sold, it was held by their Lordships of the Privy Council, affirming the decision of a Bench of the High Court at Calcutta, that whatever was the nature of the debt for which the mortgage was executed, only the right and interest of the father in the joint family property was intended to pass by the certificate of sale. In the course of their judgment their Lordships say:—"Each case must depend on its own circumstances. It appears to their Lordships that in all the cases—at least the recent cases—the inquiry has been what the parties contracted about, if there was a conveyance, or what the purchaser had reason to think he was buying, if there was no conveyance but only a sale in execution of a money decree." In the course of the argument in the case of *Pettachi Chettiar v. Sangili Veera Pandia Chinnathambiar* (2) Lord Watson observed, in regard to the case of a sale in execution of a money decree, the question being as to what the right, title and interest sold were, as follows:—"The questions are, what did the Court intend to sell and what did the purchaser understand that he bought?" In that case the suit was brought by the appellants to recover the zamindari of

1904

INAYAT  
SINGH  
v.  
IZZAT-UN-  
NISSA  
BEGAM.

Stanley, C.J.

(1) (1887) L. R., 14 I. A., 784. (2) (1887) L. R., 13 I. A., 1.

1904

INAYAT  
SINGHc.  
IZZAT-UN-  
NISSA  
BEGAM.

Stanley, C.J.

Sivegiri, which was purchased by their predecessor in title at an auction sale held in execution of various decrees obtained against the late zamindar, father of the respondent, and under which the zamindari had been attached during his life, but the actual sale took place after his death. The District Court, as also the High Court at Madras, held that nothing passed under the sale but the right to recover the rents due and unpaid at the death of the late zamindar. The plaintiffs claimed that the right to the whole zamindari passed to the auction purchaser. The defence was that the debts were not contracted for the benefit of the zamindari, and affected only the life interest of the late zamindar, and that what was sold at auction was in substance the arrears of rent which were then due to the late zamindar up to his death, and nothing more. In delivering the judgment of their Lordships, Sir Barnes Peacock, at page 88 of the Report remarks:—"If the whole estate could have been put up for sale, it was not put up. It is not a question of what the Court could have done, or what they ought to have done, but what they did, what was put up for sale, and what was purchased. If what was put up for sale was merely the estate which the father had in his life-time, then what the purchaser purchased was only that interest. The High Court having carefully reviewed the whole of the evidence and the whole of the documents came to the conclusion that the first Court was right in finding that all that was intended to be sold and all that was sold was the life interest of the father and not the whole interest in the zamindari." The rulings in these cases appear to me not to be inapplicable in the present case. What was put up for sale here, and what the Court intended to sell, and what the purchaser understood she was purchasing was the equity of redemption of property which was subject to two mortgages which were specified in the sale proclamation. In the very recent case of *Abdul Aziz Khan v. Appayasami Naicker* (1) a question somewhat similar to that which is before us was considered and determined by their Lordships. It was held that where the right, title, and interest of a judgment-debtor, owner of an impartible zamindari

(1) (1903) L. R., 31 I. A., 1.

was sold in 1873 and 1876 in execution of a decree for debts for which the debtor's joint family was not liable, and the accepted interpretation of the law at the time was that an impartible estate was inalienable, except for the life of the holder or under special circumstances, the courts must be deemed to have intended to sell and the purchaser to buy the right, title and interest as then understood, namely, as one which ceased at the debtor's death; and this notwithstanding that the interpretation of the law then prevailing has been subsequently overruled. Applying the principle of these cases to the present case, it seems to me impossible to hold that Musammat Intizam Begam, the decree-holder, who admittedly intended to buy the property in dispute subject to two mortgages which were specified in the sale proclamation, can successfully claim to have purchased an unincumbered estate. She was entitled to obtain from the Court that which the Court purported to sell and that which she agreed to purchase, that is, the property, which she purchased subject to the payment of the principal sums and interest which were stated by her before the sale to be validly charged on the property and subject to which the Court sold the property. The amount of the incumbrances which the Court was led to believe were existing incumbrances and subject to which the sale was expressly made must I think be paid; and I also am of opinion that the appellant is entitled to a lien on the property in respect of this amount. As I have pointed out, it was quite immaterial to the purchaser to whom the money is paid; the purchaser is in no way prejudiced, inasmuch as she gets all that she bargained for.

For these reasons I would allow the appeal, and set aside the decree of the Court below and give a decree to the appellants for such proportionate part of their claim as may fairly be attributable to the villages purchased by Musammat Intizam Begam. This would necessitate the taking of an account of the respective values of the villages comprised in the two mortgages so as to ascertain the proportion of the debts which is properly attributable to the villages purchased by Musammat Intizam Begam.

BLAIR, J.—It is needless to recapitulate in detail the admitted facts set forth in the judgments of the Chief Justice and

1904

INAYAT  
SINGH

v.

IZZAT-UN-  
NISSA  
BEGAM.*Stanley, C.J.*

1904

INAYAT  
SINGH  
v.  
IZZAT-UN-  
NISSA  
BEGAM.

· Blair, J.

my brother Burkitt. To avoid explanation and prolixity I shall, without following the devolutions of interest, speak of the mortgagor's interest in the series of mortgages, with which we have to deal, as Khairati's estate. Those mortgages are three in number. The first was executed on the 25th of May 1877 in favour of Govind Prasad and others. The second was executed on December 2nd, 1877, in favour of the same mortgagees. The third was executed in favour of one Musammat Intizam Begam upon October 17th, 1878, by Khairati's then representatives. On January 27th, 1887, Intizam Begam sued to enforce her mortgage, and got a decree on February 25th, 1889, for sale of the mortgaged property. At that date no suit had been instituted for the enforcement of either of the other mortgages. Musammat Intizam Begam did not implead the mortgagees under either of the other mortgages. On June 30th, 1889, Musammat Intizam Begam applied for the execution of her decree by the sale of the villages included in it, all of which villages were included in one or both of the prior hypothecations. Before the issue of a proclamation of sale under Musammat Intizam's decree, to wit, upon the 2nd June 1890, a suit was instituted to enforce the mortgage of December 2nd, 1877, and on the 24th of May 1894, after the sale held under Musammat Intizam's decree, another suit was filed to enforce the mortgage of May 25th, 1877. Both these suits were finally dismissed at dates posterior to the date of the confirmation of the sale held under Musammat Intizam's decree upon April 20th, 1894. After the mortgage of May 26th, 1877, was put in suit, the name of Musammat Intizam Begam was included by the Court in the array of defendants, but she was not made a party to the suit on the mortgage of December 1877 upon June 26th, 1894. Upon the 10th of September 1892 Musammat Intizam Begam had presented a petition to the Court executing her decree for leave to bid at the sale. The reason given was that "the decree is for a considerable amount; perhaps there might not be forthcoming any purchaser for the property is incumbered with heavy debts."

On January 6th, 1893, the proclamation of sale not having then been issued, Mr. Bamanji, pleader for the decree-holder,



filed what is described as 'a deposition' alleging that the incumbrances on the property for the sale of which his client had got a decree, were mortgages to the aggregate extent of Rs. 30,000 only and not to such larger amount as had been by mistake alleged. In the proclamation of sale the incumbrances are specifically set forth as Rs. 10,000 on mauza Girdharipur and Rs. 20,000 on the aggregate of all the other hypothecated villages. On this basis the sale took place, as is shown from a proceeding recorded by the officer conducting the sale, and which is set forth on page 6 of the appellant's printed book, and also from an order of the Collector printed on page 25 of the same book. There is nothing to show that upon any other representation than that of Musammat Intizam the two sums of Rs. 10,000 and Rs. 20,000 were so allocated to the different villages in the proclamation of sale. There is no such specification to be found in the bonds. In accordance with her request Musammat Intizam Begam was permitted to bid at the auction sale and became the purchaser of eight of the hypothecated villages for the aggregate sum of Rs. 64,100. Such purchases were made subject to the notification in the proclamation of sale of the incumbrances above specified, and no doubt to such interest as might have become due upon such incumbrances and remained unpaid. The total alleged by the plaintiff in this suit to have been due upon the footing of the two prior mortgages assuming that they were valid and binding instruments, was Rs. 1,61,766-11-0. Those mortgages having been since declared to have been invalid and in no way binding upon the estate of Khairati in the hands of the plaintiff, Musammat Intizam had not, nor after her death had her representatives, made any payment whatever upon account of such incumbrances. The plaintiff seeks to recover the whole of that sum as 'part of the unpaid vendor's purchase money,' and also claims a decree declaring that he 'has a lien for the said amount against the villages purchased at auction and now in possession of the defendants.'

The first question arising in this suit is whether the plaintiff is entitled to recover such amount, if at all, as 'vendor's unpaid purchase money.' The answer depends upon whether the

1904

INAYAT  
SINGHv.  
IZZAT-UN-  
NISSA  
BEGAM.

Blair, J.

1904

INAYAT  
SINGH

v.

IZZAT-UN-  
NISSA  
BEGAM.*Blair, J.*

purchaser at the auction sale intended to buy, and the Court holding the sale intended to sell, the interest in the property of which the sum claimed is sought to be recovered by the plaintiff as the contractual price either actual or constructive. In my opinion that question admits of but one answer. The executing Court and the purchaser both assumed the validity of the two prior incumbrances notified in the proclamation of sale, and both of them believed that what was bought and sold was the equity of redemption and no more. If that be so, the plaintiff's claim has been wrongly formulated, and we have now to consider whether the plaintiff possesses any other equity more applicable to the facts of the case on which we can and ought to give him relief. It was, I think, admitted in argument that this case falls within no precedent set forth in the records either of the English Courts or our own. I am not aware of relief in any such case having been either granted or refused, or indeed of any similar case having been litigated at all. Upon the question whether the plaintiff ought to be strictly bound by the form in which he has asked for relief, I think it lies in the discretion of the Court to grant an alternative relief not formulated in the plaint, if the facts set forth in the plaint and established disclosed a right to such other relief; and if the defendant has not been deceived or otherwise injuriously affected by the form of the plaint, such relief may properly be granted. In this case I am unable to see that the defendants have been prevented from setting up any facts material for their defence or have been otherwise prejudiced. No doubt the plaintiff's advisers have found themselves much hampered in the framing of their suit, by the absence of an appropriate precedent. Having already expressed my opinion that what was purchased by Musammat Intizam Begam was an equity of redemption only, it follows that what she undertook to pay and did pay to the executing Court was the price of the equity of redemption only, no part of which price is now unpaid. It seems to me therefore that the form of the suit was misconceived, and that we cannot grant the plaintiff relief as for unpaid purchase money. But if upon the facts before us, sitting as a Court bound to apply to the facts the principles of justice,

equity and good conscience, we find that the plaintiff has an equitable claim, we ought to pause long before refusing to grant relief. As an illustration only I may instance the usual practice of the equity Courts in suit brought for the enforcements of contracts, as summarised on page 209 of Leake on Contracts, edition of 1902, where a party claims specific performance of a contract upon a construction which is decided against him, he may in general waive his construction and obtain performance according to the construction found by the Court or that admitted by the defendant. In other words he may succeed upon a contract different from that he sued upon. To my mind there is no substantial difference between a mistaken construction of the terms of a contract and a mistaken construction of facts, and in the latter as in the former case I would hold that a plaintiff should be granted such relief as he is entitled to upon a true construction of the facts, and if in the increasing complexity of modern times cases arise to which no existing formula is strictly appropriate, it was for the repairing of such omissions that the equity Courts came into existence and developed that far-reaching series of doctrines which has now been incorporated as the dominant factor in the English law. Every formula must have had as its progenitor some single case which fitted into no then existing formula. The very essence of equity has been elasticity, and I am of opinion that this, admittedly unique, case discloses facts upon which the plaintiff is in equity entitled to relief.

I have not failed to observe that the plaintiff has not in his plaint imputed any misrepresentation, intentional or otherwise, to Musammat Intizam Begam, although she through her pleader represented to the executing Court the existence of the incumbrances afterwards set forth in the notification of sale. It was probably unknown to her that the validity of these documents would be disputed when sought to be enforced by suit. But at any rate it was to some extent at her suggestion and with her acquiescence that the property sold was notified as subject to these incumbrances. Furthermore, it was entirely in her power when she brought her suit upon her own mortgage to bring to the test the validity of these documents, of which she certainly

1904

INAYAT  
SINGH

v.

IZZAT-UN-  
NISSA  
BEGAM.*Blair, J.*

1904

INAYAT  
SINGH  
v.  
IZZAT-UN-  
NISSA  
BEGAM.  
—  
*Blair, J.*

had actual, or at all events constructive, notice, and entertaining no doubt of their validity, was bound in law to make all the mortgagees parties to her suit. Upon her offer to redeem them at such amounts as the Court might find to be then due to the prior mortgagees upon their two incumbrances the validity of such mortgages must have been put in issue between such prior incumbrancers and the representatives of Khairati's estate. If these issues had been tried in the suit brought by Musammat Intizam upon her mortgage, the state of things which has given rise to the present suit could never have arisen. On the other hand, it was not possible for the representatives of the estate of Khairati to plead in their defence in Musammat Intizam Begam's suit the provisions of section 85 of the Transfer of Property Act, because they did not admit to the smallest extent the validity of the prior mortgages. It is clear that Musammat Intizam Begam violated an express provision of the law in failing to implead the mortgagees whose rights she admitted in intention if not in fact. It is impossible to doubt that the price paid by Musammat Intizam for the villages she purchased at auction was lowered by the notification of the prior mortgages to the extent of the principal sums purporting to be secured by them, and also by the knowledge or opinion of other bidders as well as herself as to the amount of interest due upon them. To that extent it seems to me that Musammat Intizam wrongfully gained what the mortgagor's interest, the estate of Khairati, wrongfully lost. Indeed the result is precisely the same as if Musammat Intizam Begam had bought out and out the property of which she had purchased only an equity of redemption and had bought it at the price of the equity. To the same extent was the mortgagor's interest depleted. That amount I would hold that the plaintiff in this suit is entitled to recover. If Musammat Intizam believed she was buying and the executing Court believed that it was selling nothing but an equity of redemption, then that is all she took by her purchase. The whole interest in the property other than that equity of redemption of right belongs to the estate of the judgment-debtor. Seeing then that the wrongful gain of the one party is commensurate with the wrongful loss of the other and

is ascertainable in terms of money, it seems to me quite admissible for the Court to pass a decree in money instead of putting the parties to the expense of circuitous proceedings framed to restore them to their original position. The plaintiff demands precisely what Musammat Intizam Begam would have had to pay and was willing to pay to the mortgagees, whose incumbrances had been notified, and by her purchases at the sale she assented to such payment. There is no injustice in compelling her to pay the price she was willing and practically promised to pay; the only difference is in the persons to whom the payment is made. I would therefore decree this appeal with costs. Of course the liability will have to be rateably distributed among the different villages, and for that purpose an account will have to be taken. I concur in the order proposed by the Chief Justice.

BY THE COURT.

As this suit has been decided on a preliminary point, namely, that the plaintiff appellant could not maintain the suit, and other issues have been left undetermined, it will be necessary for us to remand the suit to the lower Court under the provisions of section 562 of the Code of Civil Procedure, with directions to re-admit it on the list of pending suits on its original number, and dispose of it on the merits. The Court will have regard to the judgment of this Court in regard to the liability of the defendants to pay a proportionate part only of the two mortgage debts in the pleadings mentioned, that is, so much of the mortgage debts as are properly attributable to the villages which have been purchased by the defendants respondents. For this purpose it will be necessary to have the respective values of the villages ascertained and the apportionment made in view of the provisions of section 82 of the Transfer of Property Act. The Court will have regard to the fact that only some of the villages are subject to the mortgage to secure Rs. 30,000 and the fact that each mortgage does not affect each of the villages. The first and fifth issues, which are practically the same, alone have been disposed of by our judgment, and it was admitted before us that section 244 of the Code of Civil Procedure does not bar the suit. The other issues remain to be

1904

INAYAT  
SINGH  
v.  
IZZAT-UN-  
NISSA  
BEGAM.

Blair, J.



1904

INAYAT  
SINGH  
v.  
IZZAT-UN-  
NISSA  
BEGAM.

determined. The respondents must pay the costs of this appeal. All other costs will abide the event. The objections filed under section 561 of the Code are not pressed. They are dismissed with costs.

*Appeal decreed and cause remanded.*

1904  
July 5.

## APPELLATE CIVIL.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.*

CHUNNI LAL (PLAINTIFF) v. JUGAL KISHORE AND ANOTHER  
(DEFENDANTS).\*

*Civil Procedure Code, section 295—Execution of decrees—Application for rateable distribution of assets—Notice of such application to other decree-holders unnecessary.*

*Held* that it is nowhere provided by law either that an application for rateable distribution of assets realized in execution of a decree cannot be made in the course of execution proceedings taken by the applicant himself, but must be made in the course of execution proceedings initiated by some other decree-holder, or that notice of such an application having been made must of necessity be given to the other decree-holders.

IN this case Chunni Lal obtained a decree against Shiam Lal and others on the 24th of December 1898. Some two days previously Jugal Kishore and Nand Kishore had obtained a decree against the same parties. On the 26th of January 1900 Chunni Lal applied for execution of his decree, and for the attachment thereunder of five houses and two plots of land, and this application was granted. Subsequently Jugal Kishore and Nand Kishore applied for execution of their decree, and the same property was attached. Chunni Lal seems to have made two applications for execution of his decree, but nothing was done on these applications. Jugal Kishore and Nand Kishore then applied for sale of the property in pursuance of their attachment, and got an order for sale. Thereupon, on the 30th of October 1900, Chunni Lal applied to the Court under the provisions of section 295 of the Code of Civil Procedure for a rateable distribution of the money to be realized by

\* Second Appeal No. 565 of 1902 from a decree of L. Stuart, Esq., District Judge of Farrukhabad, dated the 14th of May 1902, reversing a decree of Babu Upendra Nath Sen, Munsif of Farrukhabad, dated the 27th of February 1902.

that sale. The sale took place on the 31st of October, and was confirmed on the 4th of January 1901. On the 19th of January 1901 Chunni Lal made a fresh application for rateable distribution, but it was rejected, and all the sale proceeds were paid to Jugal Kishore and Nand Kishore. The present suit was accordingly instituted by Chunni Lal to recover from Jugal Kishore and Nand Kishore Rs. 1,000, which was alleged to be the rateable share to which the plaintiff was entitled. The Court of first instance (Munsif of Farrukhabad) decreed the plaintiff's claim; but on appeal by the defendants the District Judge reversed the Munsif's decision and dismissed the suit on the ground that the application for rateable distribution made on the 19th of January 1901 was subsequent to the sale, and was therefore late, and that the previous application made on the 30th of October 1900 was ineffectual because it was made in the course of proceedings in execution of the plaintiff's own decree and not in the execution proceedings in the suit of the defendants respondents, in which the money was realized. The plaintiff thereupon appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Pandit *Sundar Lal*, for the respondents.

STANLEY, C. J., and BURKITT, J.—A question under section 295 of the Civil Procedure Code is involved in this appeal. The plaintiff obtained a decree against one Shiam Lal and others on the 24th of December 1898. The defendants had obtained a decree against the same parties two days previously. On the 26th of January 1900 the plaintiff applied for execution of his decree and for the attachment thereunder of five houses and two plots of land, and this application was granted. Subsequently the defendants applied for execution of their decree, and the same property was attached. The plaintiff appears to have made two applications for execution of his decree, but nothing was done under these applications. The defendants then applied for sale of the property, in pursuance of their attachment, and got an order for sale, and thereupon, on the 30th of October 1900, the plaintiff applied under the provisions of section 295 to the Court for a rateable distribution of the money to be realized by that sale. The sale took place on the

1904

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CHUNNI  
LAL  
v.  
JUGAL  
KISHORE.

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1904

CHUNNI  
LAL  
v.  
JUGAL  
KISHORE.

31st of October, and was confirmed on the 4th of January 1901. The plaintiff then made a fresh application for rateable distribution on the 19th of January 1901, which was rejected. This application appears to us to have been entirely unnecessary, except as a reminder to the Court of the fact that the applicant was also a decree-holder and that he had already made an application under section 295 on the 30th of October 1900. The application was refused, and all the sale proceeds were paid to the defendants, respondents here. Thereupon the present suit was instituted to recover Rs. 1,000, moneys realized out of the sale, which are stated to be the rateable share to which the plaintiff is entitled.

The Munsif gave a decree in favour of the plaintiff, but on appeal the District Judge set aside the decree of the Munsif and dismissed the plaintiff's suit, on the ground that the application for rateable distribution made on the 19th of January 1901 was subsequent to the sale, and was therefore late, and also on the ground that his previous application made on the 30th of October 1900 was ineffectual because it was made in the course of proceedings in execution of the plaintiff's own decree and not in the execution proceedings in the suit of the defendants respondents, in execution of which the money was realized. The learned District Judge says :—" With regard to his former application, which was dated 30th October 1900, and which was made in the course of the proceedings in execution of his own decree, I hold that that can have no effect in the matter, as it was made under circumstances which are not within the knowledge of the appellants and the appellants were not in a position to object thereto or to modify their course of action in consequence of the same. To hold otherwise might cause grave hardship. To take the case of a decree-holder who had attached only such property as was necessary to satisfy his own decree. According to my view of the law, if another decree-holder wished to share in the distribution of the sale proceeds of this property, he would have to put in an application for such distribution to the knowledge of the first decree-holder before the property was sold, and if the property in question were insufficient to satisfy both decrees, the first decree-holder would be in

a position to attach more property before the sale," and so forth. We are wholly unable to agree with the learned District Judge in his view of the law. He puts restrictions upon the rights of decree-holders which are not to be found in the section in question. In order that a decree-holder may be entitled to a rateable distribution under this section the following conditions must exist; two or more decree-holders must be holders of decrees for money against the same judgment-debtor; the decree-holder seeking rateable distribution must prior to the realization have applied to the Court by which the assets are held for execution of his decree; the realization of the assets must have been made by sale or otherwise in execution of the other decree. In this case the plaintiff applied to the Court under the section on the 30th of October 1900, he having previously applied to the same Court for execution of his decree: the sale took place on the 31st October 1900. His application therefore was prior to the realization of the assets. A portion of the purchase money was paid on the date of the sale and the balance on the 15th of the following November. It appears to us therefore that all the conditions which the law requires were fulfilled in this case. The learned District Judge seems to think that the application must be made in such a way that the decree-holder at whose instance assets have been realized must have knowledge of the application for rateable distribution. The section nowhere provides for this. In this he is, in our opinion, entirely mistaken. The section is as clearly framed as a section can be, and we fail to understand how the learned District Judge came to interpolate into it words which are contrary to the true intent and meaning of its provisions. Then it is contended by the learned advocate for the respondents that because the application for rateable distribution made on the 30th October 1900 was filed in an execution case, No. 28 of 1900, which was struck off the file of pending cases on the 24th of November 1900, it ceased to have any validity and did not operate as an application to the Court within the meaning of section 295. We cannot take this view of the order of the 24th of November 1900. It appears to us to have amounted to nothing more than stay of the proceedings in

1904

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CHUNNI  
LAL  
v.  
JUGAL  
KISHORE.

1904

CHUNNI  
LAL  
v.  
JUGAL  
KISHORE.

that execution matter, and in no way operated to prejudice the effect of the application for rateable distribution. For these reasons we allow the appeal, set aside the decree of the lower appellate Court, and, inasmuch as the learned District Judge disposed of the appeal upon a preliminary point, and we have overruled him upon that point, we remand the appeal under the provisions of section 562 of the Code of Civil Procedure, with directions that it be replaced on the file of pending appeals, in its original number, and be tried upon the merits. The appellant is entitled to the costs of this appeal. All other costs will abide the event.

*Appeal decreed and cause remanded.*

1904  
July 5.

*Before Mr. Justice Blair.*

KASHI GIR (DEFENDANT) v. JOGENDRO NATH GHOSE (PLAINTIFF).<sup>\*</sup>  
*Act No. IV of 1882 (Transfer of Property Act), section 107—Lease of immovable property—Qabuliat not a lease.*

Where a lease of immovable property is for a period of more than one year, it must be made by means of a duly executed and registered *patta*; such a lease cannot be created by or proved by the production of a *qabuliat* only. *Nand Lal v. Hanuman Das* (1) referred to.

THIS was a suit to compel the execution by the defendant of a perpetual lease of certain property, according to the terms of a draft filed with the plaint. The defendant pleaded that the claim was barred as *res judicata* in consequence of the decision of a Court of Revenue upon an application made by the defendant under section 36 of Act No. XII of 1881. In those proceedings the Court of Revenue found that the present plaintiff was not a tenant at fixed rates and was therefore liable to ejectment, and passed an order for ejectment. It was contended that in those proceedings the present plaintiff might have, but did not, set up the defence that he was the lessee of the land in question. The Court of first instance (Additional Subordinate Judge of Benares) decreed the plaintiff's claim, and an appeal

<sup>\*</sup> Second Appeal No. 276 of 1903, from a decree of J. Sanders, Esq., District Judge of Benares, dated the 22nd of November 1902, confirming a decree of Babu Achal Bihari, Additional Subordinate Judge of Benares, dated the 4th of August 1902.

(1) (1904) I. L. R., 26 All., 368.



filed by the defendant was dismissed by the District Judge. The defendant accordingly appealed to the High Court.

Dr. *Satish Chandra Banerji*, for the appellant.

Babu *Durga Charan Banerji*, for the respondent.

BLAIR J.—In this suit the plaintiff asks that the defendant may be made to execute and register a document which shall confer upon him a lease containing provisions which are set forth in a draft, as I understand, approved of by both parties. The appellant sets up a *res judicata*, the *res judicata* being the finding of a Revenue Court upon an application under section 95 of the North-Western Provinces Rent Act. The Revenue Court found that the present plaintiff was not a tenant at fixed rates, and was therefore liable to ejectment, and passed an order for ejectment. That decision of the Revenue Court has been set up as a *res judicata*. It is said that it was open to the present plaintiff, the defendant in the former proceeding, upon the hearing before the Revenue Court to set up and establish that he was a lessee, and that would have been an answer to the application for ejectment which he could and ought to have set up. That matter is disposed of by a judgment of this Court, for which I am responsible, in the case of *Nand Lal v. Hanuman Das* (1). In that case I held that under the provisions of section 107 of the Transfer of Property Act a lease could not be created by the signature upon a *qabuliat* only. Until such lease or *patta* is duly executed and registered, no lease is created, and except by the production of such document no lease could be proved in a court of justice. It follows therefore that the present plaintiff could not have set up in the Revenue Court that he was a lessee, for the simple reason that no lease had been then executed. The case to which I have referred above followed a judgment (printed as a footnote to the case of *Nand Lal v. Hanuman*) of the late Chief Justice Sir John Edge and my brother Burkitt in an appeal under the Letters Patent against a judgment of my own. In that case it was held broadly and flatly that no lease could be created by or could be proved by the production of a *qabuliat* only. Upon the matter of injunction it seems to me the Court has exceeded its

(1) (1904) I. L. R., 26 All., 368.

1904

KASHI GIR  
v.  
JOGENDRO  
NATH  
GHOSH.

1904

KASHI GIRI  
v.  
JOGENDRO  
NATH  
GHOSH.

functions. It was asked in the plaint to grant a perpetual injunction directing the defendant not to interfere with the plaintiff's possession under the terms of the *gabuliat*. The plaintiff had no right to possession under the terms of the *gabuliat*. He must have a *patta* before he could acquire any right as a lessee. That being so, whatever his status may have been at the time when the Revenue Court ordered him to be ejected, in that status, as far as I can understand, he remained, or else his possession was that of a trespasser. When the plaintiff has got his lease duly executed and registered, then and then only he will be entitled to the rights and privileges of a lessee. I therefore set aside that part of the judgment and decree of the Court below which grants the injunction, and affirm that part of the judgment and decree of the Court below which orders the defendant to execute and register a good *patta*. The appeal is therefore allowed as far as the injunction is concerned and dismissed as to the remainder. The parties will pay and receive costs in proportion to their failure and success.

*Decree modified.*

1904  
July 6.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burdett.*  
THE MAHARAJA OF BENARES (DEFENDANT) v. RAMJI KHAN AND OTHERS  
(PLAINTIFFS).\*

*Act No. I of 1877 (Specific Relief Act), section 42—Declaratory decree—Discretion of Court—Joint Hindu family—Non-joinder of parties.*

Where some of the descendants of a judgment-debtor under two Rent Court decrees filed a suit in a Civil Court, asking for a declaration that the joint ancestral family property was not liable, after the decease of the judgment-debtor, to be taken in execution of such decrees, and did not make parties to the suit, the two sons of the judgment-debtor, it was held that the Court exercised a right discretion under section 42 of the Specific Relief Act, 1877, in refusing to grant a declaratory decree.

THE Maharaja of Benares held two decrees for rent against one Niranjana Khan, dated respectively the 22nd of September 1894 and the 24th of January 1898, and in execution thereof a 2-anna share in mauza Bhagirathpur, which belonged to

\* Second Appeal No. 851 of 1903, from a decree of L. Marshall, Esq., District Judge of Ghazipur, dated the 29th of June 1903, reversing a decree of Babu Hari Mohan Banerji, Munsif of Ghazipur, dated the 20th of April 1903.

Niranjan Khan as ancestral property, was attached and ordered to be sold. Attempts were made by the original judgment-debtor, and after his death by his sons, Sheonandan Khan and Ramnandan Khan, to save the property from sale, but their objections seem to have been disallowed. Ultimately the sons of Ramnandan Khan and the son and grandson of Sheonandan Khan instituted the suit out of which this appeal arose, in which they asked for a decree that the 2-anna share in Bhagirathpur, and not merely their interest therein, was not liable to sale in execution of the two decrees held by the defendant Maharaja against Niranjan Khan, their ancestor. Sheonandan Khan and Ramnandan Khan, though alive, were not made parties to this suit. The Court of first instance (Munsif of Ghazipur) held that the non-joinder of Sheonandan Khan and Ramnandan Khan was fatal to the suit, and dismissed it. The plaintiffs appealed. The lower appellate Court (Officiating District Judge of Ghazipur) overruled the Munsif's decision on the question of non-joinder of parties, and finding that the decrees in question could only be executed against the interest of Niranjan Khan in the attached property, allowed the appeal and decreed the plaintiffs' claim with costs. Against this decree the defendant appealed to the High Court.

Pandit *Sundar Lal*, for the appellant.

Munshi *Gobind Prasad*, for the respondents.

STANLEY, C.J., and BURKITT, J.—This second appeal, which has occupied a good deal of the time of the Court, arises out of a suit which was instituted by the plaintiffs respondents to have a declaration that certain property, namely, a 2-anna share in mauza Bhagirathpur, was not liable to be attached and sold in execution of two decrees, dated the 22nd of September 1904 and the 24th of January 1898, respectively, which were obtained by the defendant appellant against one Niranjan Khan, deceased. Niranjan Khan is the predecessor in title of the plaintiffs. He left two sons surviving him, namely, Sheonandan Khan and Ramnandan Khan, both of whom are alive. The plaintiffs are the three grandsons and a great-grandson of Niranjan Khan. It appears that the defendant appellant obtained the two decrees, to which we have referred, for arrears of rent. These

1904

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THE  
MAHARAJA  
OF BENARES  
v.  
RAMJI  
KHAN.

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1904

THE  
MAHARAJA  
OF BENARES  
v.  
RAMJI  
KHAN.

decrees were put in execution and the 2-anna share of the village which belonged to Niranjana Khan as ancestral property was attached and ordered to be sold. The proceedings in execution of the decrees were taken in the Collector's Court. We are informed, and we have no doubt that it is true, that Sheonandan Khan and Ramnandan Khan both resisted the sale of the property, but their objections were disallowed. Thereupon the present respondents, endeavouring to throw further obstacles in the way of the realization of the claim of the defendant appellant, have instituted the present suit. In the time of Niranjana Khan also an attempt was made to prevent a sale. It appears from the records that he filed an objection on the 16th of May 1899, in which he objected to the sale of the property, stating that it was heavily incumbered and admitting that it was under attachment. His objection, however, also failed.

The present suit is a declaratory suit instituted under the provisions of section 42 of the Specific Relief Act, which gives the Court discretionary power to make a declaratory decree, if it think that under the circumstances of the particular case the plaintiff is entitled to such decree. Now, under the Rent Act, the Legislature has made provision for determining questions such as are raised in the present appeal. It was open to the plaintiffs to file an objection or appear before the Collector and claim a right to, or interest in, the property. If they had done so, it would have been the duty of the Collector to examine the parties and their witnesses and satisfy himself as to whether or not the claim put forward was well founded. If they failed to establish their claim before the Collector, it would have been open to them, under the provisions of section 181 of Act No. XII of 1881, to institute a suit in the Civil Court to establish their right at any time within one year from the date of the order. Now in this case, strange to say, the plaintiffs did not implead Sheonandan Khan or Ramnandan Khan, who unquestionably have an interest in the property, the subject-matter of the suit, and in their claim they ask for a declaration from the Court that the entire 2-anna zamindari share is not liable to be attached and sold in execution of the defendant-appellant's decree. They do not limit their claim to a declaration that their

own interest in the 2-anna share is not liable to be sold. The Munsif before whom the case came in the first instance was of opinion that Sheonandan Khan and Ramnandan Khan ought to have been impleaded, and that they not having been impleaded, the Court should not in the exercise of its discretion determine the question raised in the plaint and, therefore, dismissed the suit. We are of opinion that the learned Munsif was perfectly right. It is difficult for us to know what proceedings have taken place in the Court of the Collector. We do not know what orders have been passed either as regards Sheonandan Khan and Ramnandan Khan or the plaintiffs, or any of them, and it is obviously inconvenient that the Court should intervene in a matter which is pending in the Collector's Court, particularly as the Legislature has provided a definite course for persons in the position of the plaintiffs to take in a case where property in which they claim to have an interest is being attached and sold. We think therefore that the learned Munsif exercised a wise discretion in refusing to grant the relief claimed under section 42 of the Act to which we have referred. On appeal the learned Officiating District Judge does not appear to have considered the provisions of section 42, nor was his attention apparently directed to that section. He determined the case in favour of the plaintiffs respondents on the ground that the rent decree, such as the decrees which were obtained in this case by the defendant appellant, cannot be executed against the descendants of the judgment-debtor. That was a question, not for the learned Officiating District Judge to determine, but for the Rent Court, which has jurisdiction to deal with questions arising in execution of rent decrees.

We think that for these reasons this appeal ought to be allowed, and that the decree of the lower appellate Court should be set aside. This will not interfere with the right of the plaintiffs to take such steps in the Court of the Collector as they may be advised in defence of their rights, if any, in the property. We therefore allow the appeal, set aside the decree of the lower appellate Court, and restore the decree of the Munsif dismissing the suit, with costs in all Courts.

*Appeal decreed.*

1904

THE  
MAHARAJA  
OF BENARES  
v.  
RAMJI  
KHAN.



1904  
July 6.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burdett.*

ZINAT-UN-NISSA AND OTHERS (PLAINTIFFS) v. RAJAN (DEFENDANT)\*.

*Civil Procedure Code, section 13, explanation II—Res judicata—Matter which might and ought to have been made a ground of attack in a former suit.*

The plaintiffs sued for their share by right of inheritance in the assets of a deceased Muhammadan, the defendant being the widow of the propositus. In that suit the widow pleaded that she was in possession of the property claimed in virtue of a deed of gift from her late husband, and also that she had a lien on it for unpaid dower. The latter defence was accepted by the Court, and the plaintiff's suit dismissed. The plaintiffs then brought a second suit against the widow, in which they offered to redeem the dower debt, and claimed possession after such redemption. *Held* that this second suit was not barred by section 13, explanation II, of the Code of Civil Procedure. *Imam Bakhsh v. Chundo* (1), followed.

ONE Sakhawat Husain died in 1890, and shortly after his death his sister, Musammat Zinat-un-nissa, and two cousins, Dost Muhammad and Fazl-ud-din filed a suit against his widow, Musammat Rajan, to recover their shares in the estate of Sakhawat Husain. In that suit Musammat Rajan set up the defence that she was in possession of the property of her husband under a deed of gift from him, and also that she was entitled to hold possession of the property in dispute until her dower debt, which, she alleged, remained unpaid, had been satisfied. The first defence set up failed, but the Court held that Musammat Rajan was entitled to dower which remained unsatisfied, and that she could not be dispossessed from the property of her husband so long as the dower debt was unsatisfied. The then plaintiffs subsequently brought the suit out of which this appeal has arisen, and by it they sought to obtain possession of their shares in the property of Sakhawat Husain, admitting the defendant's right to possession in lieu of dower, but alleging that the dower had been mostly paid by Sakhawat Husain in his life-time, and as to the balance had been discharged out of the profits of the property. The Court of first instance (Munsif of Sahaswan) considered that the suit was barred by section 13, explanation II, of the Code of Civil Procedure, and therefore dismissed it, and this view was upheld on appeal.

\* Second Appeal No. 890 of 1903, from a decree of C. D. Steel, Esq., District Judge of Shahjahanpur, dated the 20th of July 1903, confirming a decree of Maulvi Muhammad Azimuddin, Munsif of Sahaswan, dated the 28th of March 1903.

(1) Weekly Notes, 1888, p. 69.

by the District Judge. The plaintiffs thereupon appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellants.

Mr. *Abdul Majid* (for whom Mr. *Ishaq Khan*), for the respondents.

1904

ZINAT-UN-  
NISSAv.  
RAJAN.

STANLEY, C. J.—The property which is the subject-matter of this appeal formerly belonged to Sakhawat Husain, the husband of the defendant respondent Musammat Rajan. He died in the year 1890, and shortly afterwards the plaintiffs appellants, who are his sister and two cousins, sons of a paternal uncle, instituted a suit to recover their share of the estate of Sakhawat, the defendant respondent Musammat Rajan being impleaded as defendant. In that suit Musammat Rajan set up the defence that she was in possession of the property of her husband under a deed of gift from him, and also that she was entitled to hold possession of the property in dispute until her dower debt, which she alleged remained unpaid, has been discharged. In that suit the first defence of Musammat Rajan failed, but the Court held that she was entitled to dower which remained unsatisfied, and that she could not be dispossessed of the property of her husband so long as the dower debt was unsatisfied; that in fact she was entitled to possession until payment of her dower debt.

The plaintiffs appellants, who were the plaintiffs in the former suit, have instituted the present suit, claiming what I may call 'redemption of the dower debt,' if any portion of it remain unpaid, and upon redemption recovery of their share of the estate of Sakhawat Husain. They allege in the plaint that the dower debt of the defendant amounted to Rs. 800, and that of this sum Rs. 600 was satisfied during the life-time of Sakhawat, and a balance of Rs. 200 only remained due. This balance they allege the defendant has received out of the profits of the property of the deceased of which she is found to be in possession.

The learned Munsif before whom the case came was of opinion that the suit was barred by section 13 of the Code of Civil Procedure, and his view was upheld upon appeal by the learned District Judge, who says in the course of his judgment:—"It seems to me that this is a matter which ought to

1904

ZINAT-UN-  
NISSAv.  
RAJAN.

Stanley, C.J.

have been made a ground of attack in the case which terminated with the High Court's judgment of the 1st of May 1894, and so the case comes under section 13, explanation II, Civil Procedure Code." I am wholly unable to agree in the view thus expressed by the lower Courts. It appears to me that the two causes of action are separate and distinct. When the plaintiffs instituted their first suit, their claim was as heirs of Sakhawat Husain to recover their share of his estate. It is not to be presumed that they had any knowledge that the dower of his widow was then unsatisfied, or that she was in possession of the assets of her husband in lieu of her dower. Their suit was dismissed upon the ground set up in one of the defences of the defendant respondent that she was in possession of the property in lieu of dower then unsatisfied. On the basis of the determination in that suit the plaintiffs instituted the present suit, it being one to pay off and satisfy the dower debt, if it be unsatisfied, and to obtain their share of the assets of Sakhawat Husain. So long as causes of action are distinct, a party may bring as many actions as there are causes of action. The cause of action in this suit is to my mind clearly distinct from the cause of action in the former suit. Under section 13 of the Code a plaintiff is only bound to make as a ground of attack in the suit, a matter which not merely might but *ought* to have been made a ground of attack, and it is only when a matter might and *ought* to be made a ground of attack in a former suit that the section provides that such matter shall be deemed to be a matter directly and substantially in issue in the suit. In this case, undoubtedly, if the plaintiffs had been aware that the dower was unsatisfied and that the defendant in that suit was in possession of the assets of her husband in lieu of such dower, they would have framed their claim in the form adopted in the present suit, namely, for redemption of the property upon payment of the dower. It seems to me that in the earlier suit, in which the plaintiffs claimed their share of their ancestor's property and did not admit the existence of any dower debt, it would have been inconsistent and inconvenient to have added to it an alternative claim for redemption. I am confirmed in this view by the

decision in the case of *Imam Bakhsh v. Chundo* (1), the facts of which seem to be on all fours with those in the present case; and I am bound to say that I have no hesitation in holding that the Courts below were entirely in error in applying the provisions of section 13 to this suit. I therefore would allow the appeal, set aside the decrees of the Courts below, and remand the case under section 562 of the Code.

BURKITT, J.—All that I consider it necessary to say in this case is that in view of the opinion expressed by the learned Judges who decided the case of *Imam Bakhsh v. Chundo* (1), a case which is on all fours with the present case, and by the ruling in which I am bound, I have come to the conclusion that the two lower Courts were wrong in holding that this suit came within the provisions of the second explanation to section 13 of the Code of Civil Procedure. I therefore concur in the proposed order of the learned Chief Justice that the suit should be remanded for decision on the merits.

BY THE COURT :—The order of the Court is that the appeal be allowed, the decrees of the lower Courts set aside, and the suit remanded to the Court of first instance, through the lower appellate Court, under the provisions of section 562 of the Code of Civil Procedure, with directions that it be replaced on the file of pending suits, in its original number, and be tried upon the merits. The plaintiffs appellants will be entitled to the costs of this appeal. All other costs will abide the event.

*Appeal decreed and cause remanded.*

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.*

NAND RAM AND ANOTHER (PLAINTIFFS) v. RAM PRASAD AND ANOTHER (DEFENDANTS).\*

*Civil Procedure Code, sections 111 and 216—Set-off—Cross claim in the nature of set-off.*

Plaintiffs as brokers for the sale of indigo seed sued defendants to recover the amount alleged to be due to them by the defendants as commission on account of certain sales of indigo seed made by them on behalf of the

\* Second Appeal No. 962 of 1903 from a decree of J. Denman, Esq., District Judge of Cawnpore, dated the 10th of August 1903, modifying a decree of Munshi Sheo Sahai, Subordinate Judge of Cawnpore, dated the 5th of July 1902.

(1) Weekly Notes 1886, p. 69.

1904

ZINAT-UN-  
NISSA  
v.  
RAJAN.

1904

July 9.

1904

NAND RAM

v.  
RAM  
PRASAD.

defendants. *Held* that the Court might properly take into consideration by way of an equitable set-off the loss occasioned by the plaintiffs to the defendants through the plaintiffs' negligence in not carrying out the defendants' instructions respecting the selling of the seed. *Niaz Gul Khan v. Durga Prasad* (1), followed.

THE plaintiffs in this case were brokers or commission agents. They sued the defendants to recover from them Rs. 1,000 odd alleged to be due to them by the defendants on account of the sale of some 463½ bags of indigo seed on behalf of the defendants. The defendants pleaded *inter alia* that owing to the negligence of the plaintiffs in not carrying out the instructions given to them by the defendants concerning the sale of the indigo seed the plaintiffs had caused the defendants a loss of some Rs. 850. The Court of first instance (Subordinate Judge of Cawnpore) found that the defendants had failed to prove the loss alleged to have been suffered by them through the negligence of the plaintiffs, and decreed the major portion of the plaintiff's claim, allowing only two small items claimed by the defendants. The defendants appealed. The lower appellate Court (District Judge of Cawnpore) found that the plaintiffs had been guilty of gross negligence and carelessness in not obeying the defendants' instructions, and that the defendants had in this way suffered a loss of over Rs. 500. The District Judge agreed with the Court of first instance as to the two smaller items claimed by the defendants, in respect of which the plaintiffs had filed objections under section 561 of the Code of Civil Procedure. In the end the plaintiffs' objections were dismissed, and the decree of the Court of first instance was reduced by more than one-half. The plaintiffs appealed to the High Court.

Pandit *Moti Lal Nehru* (for whom Pandit *Mohan Lal Nehru*), for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondents.

STANLEY, C. J., and BURKITT, J.—In this suit the plaintiffs' claim was for money alleged to be due to them by the defendants upon a commission agency account. The defendants' firm sent bags of indigo seed to the plaintiffs for sale on commission. It appears that 436 bags were sent between the



24th of December 1898 and the 15th of February 1899 from Muttra by the defendants, and that  $27\frac{1}{2}$  bags were purchased by the plaintiffs at Cawnpore for the defendants for sale. In all the defendants were commissioned to sell  $463\frac{1}{2}$  bags. Of these, 369 bags were sold on or before the 31st of August 1899, but  $94\frac{1}{2}$  bags were not sold for 10 months and more, despite express instructions to the plaintiffs from the defendants to sell them forthwith for any sum which could be obtained in the market. The written statement of the defendants, though not artistically drawn, is perfectly clear as to what their case was. They say that by reason of the neglect and carelessness of the plaintiffs in the fulfilment of obligations under the contract as agents they have caused considerable loss to the defendants, and that this loss the plaintiffs should make good, and they claim a set-off in respect of that loss. The learned District Judge on appeal has come to the conclusion that inasmuch as the set-off was not claimed *in a formal manner*, that is, we presume was not claimed as a set-off within the meaning of section 111 of the Code of Civil Procedure, he could not award relief to the defendants *by way of set-off*. He overlooked the fact that relief may be given by way of set-off otherwise than under section 111. He says in his judgment:—  
“It is clear also that in the present case no set-off for damages, &c., having been claimed by defendants in a formal manner, no set-off against plaintiffs’ claim can be made in that way.” But the learned District Judge did give relief in what he considers an informal way, namely, an equitable set-off; he has measured the amount of damages which the defendants suffered by reason of the gross negligence of the plaintiffs in abstaining from selling the indigo seed at the proper time. He has in effect estimated the loss suffered by the defendants as equivalent to the amount which in the ordinary course the plaintiffs would have been entitled to for brokerage, warehouse charges, &c., and set off the one against the other. Now that a set-off of damages in this way may be allowed is clear from a number of decisions, the latest of which is the case of *Niaz Gul Khan v. Durga Prasad* (1) in which Edge, C. J., and Blair, J.,

(1) (1892) I. L. R., 15 All., 9.

1904

NAND RAM  
v.  
RAM  
PRASAD.

1904

NAND RAM

v.

RAM  
PRASAD.

pointed out that "there is a series of decisions showing that in the view of the Courts in India a right to set-off may arise under circumstances under which the right would not arise in England and under circumstances under which a right to set-off under section 111 of the Code of Civil Procedure would not arise." We think therefore that the learned District Judge was justified in the course which he adopted, namely, in allowing an equitable set-off, and that his decree ought not to be disturbed. We therefore dismiss the appeal with costs. The objections are withdrawn.

*Appeal dismissed.*

1904

July 14.

*Before Mr. Justice Blair and Mr. Justice Burdett.*

NABI MUHAMMAD (JUDGMENT-DEBTOR) v. JWALA PRASAD  
(DECREE-HOLDER).\*

*Civil Procedure Code, section 13—Res judicata—Execution of decree—Application dismissed for want of jurisdiction—No appeal from order of dismissal—Subsequent application barred.*

A Munsif as a Court executing a decree dismissed an application for execution, holding that owing to certain proceedings in insolvency which had taken place at the instance of the judgment-debtor in the Court of the District Judge, he (the Munsif) had no jurisdiction to entertain it. No appeal was preferred against the order of the Munsif dismissing this application for execution, and the Munsif's order became final.

*Held* that a further application by the same decree-holder in the same Court to execute the same decree against the same judgment-debtor was barred by section 13 of the Code of Civil Procedure.

THE facts of this case are as follows:—

The decree-holder, one Jwala Prasad, obtained a simple money decree on the 25th of July 1898. On the 20th of January 1899 an application (the second) was made for execution of that decree, and in pursuance thereof the judgment-debtor was arrested. In March 1899 the judgment-debtor applied to be declared an insolvent, and was so declared on the 27th of April of the same year. In consequence of the insolvency proceedings pending before the District Judge, the application for execution of the 20th of January 1899 was struck off on the 31st of May 1899. On the 18th of January 1902 the decree-holder applied to the Munsif for execution of the decree by

\* First Appeal No. 27 of 1904, from an order of Mr. Aziz-ur-Rahman, Subordinate Judge of Mainpuri, dated the 17th of December 1903.

attachment of property belonging to the judgment-debtor. On objection taken by the judgment-debtor this application was rejected on the 10th of May 1902, the Munsif holding that he was incompetent to entertain an application for execution of a decree against the property of a person who had been declared to be an insolvent by the District Judge. No appeal was preferred against this order, and it became final. On the 20th of August 1903 the decree-holder again applied for execution in the Court of the Munsif. The Munsif rejected the application as being time-barred. He appealed to the Subordinate Judge, who remanded the case under section 562 of the Code of Civil Procedure. From this order of remand the judgment-debtor appealed to the High Court.

Maulvi *Ghulam Muftaba* and Dr. *Satish Chandra Banerji*, for the appellant.

Pandit *Baldeo Ram*, for the respondent.

BLAIR and BURKITT, JJ.—This is an appeal against an order of the Subordinate Judge of Mainpuri reversing an order of the Munsif of that District which had rejected the respondent's application for execution of a decree. The facts out of which this appeal has arisen are as follows:—The decree-holder, one Jwala Prasad, obtained a simple money decree on the 25th July 1898. An application was made for execution of that decree, but with it we have no concern in this appeal. A second application was made on the 20th of January 1899, and in pursuance of this application the judgment-debtor was arrested. He applied under the insolvency provisions of the Code to be declared an insolvent in March 1899, and was so declared on the 27th of April of the same year. The District Judge who passed that order directed that the debts mentioned in the petition should be entered in a schedule to be prepared under section 352 of the Code; but while declaring the applicant to be an insolvent he did not appoint any receiver of the property, nor did he in so many words declare the insolvent to be discharged. As a matter of fact nothing more appears to have been done. The proceedings in the Judge's Court were slovenly in the extreme. No schedule of debts was drawn up under section 352. In consequence of these insolvency proceedings

1904

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NABI  
MUHAMMAD  
v.  
JWALA.

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1904

NABI  
MUHAMMAD  
v.  
JWALA.

the application of the 20th of January 1899 was struck off the file of pending execution applications on 31st of May 1899. On the 18th of January 1902 the decree-holder, Jwala Prasad, applied to the Munsif for execution of the decree by attaching property belonging to the judgment-debtor. On objection taken on behalf of the judgment-debtor the application was disallowed on the 10th of May 1902, the Munsif holding that he was incompetent to entertain an application for execution of a decree against the property of a person who had been declared to be an insolvent by the District Judge. He therefore rejected the application for execution. His order thereupon has become final, as no appeal was taken from it. The present application for execution was made on the 20th of August 1903, and it was made to the Munsif, who in his judgment discussed some question of limitation and rejected the application as being time-barred. On appeal to the Subordinate Judge the decision of the Munsif as to the limitation question was overruled, and the case was remanded under section 562 of the Code of Civil Procedure for decision on the merits. In our opinion no question of limitation arises for decision in this case. When it was decided by the Munsif on the 10th of May 1902 that he had no jurisdiction to entertain an application for execution of the decree passed against the judgment-debtor, Nabi Muhammad, it was for the decree-holder, if he considered that decision to be wrong, to have appealed against it. He refrained from appealing, and the consequence is that that decision has now become final. Consequently we have before us an issue as to his competency to hear an application for execution of this decree decided by the Munsif on the 10th of May 1902 against this applicant. We have the Munsif's decision on that issue now become final '*inter partes*' in the absence of an appeal, and we have now another application to the same Court to execute the same decree against the same judgment-debtor in the face of the final decision by the Munsif that his Court had no power to entertain such an application. It looks almost as if this were an attempt under the disguise of a fresh application in execution to obtain from the Munsif a review or a rehearing of his previous decision. That in our opinion cannot

be done. The provisions of section 13 of the Code of Civil Procedure are clearly applicable to such a state of facts. We are of opinion that the application of the 20th of August 1903 when presented to the Court of the Munsif was presented to a tribunal which, by reason of its former decision, was incompetent to hear it. Therefore for these reasons, and without entering into any question of limitation, which under the circumstances we consider immaterial, we allow this appeal; we set aside the order of remand of the Subordinate Judge, and we restore the order of the Munsif rejecting the application with costs in all Courts.

*Appeal decreed.*

*Before Mr. Justice Blair and Mr. Justice Burkitt.*

RAM PRASAD AND ANOTHER (DEFENDANTS) v. BHIMAN AND ANOTHER (PLAINTIFFS).\*

*Act No. VII of 1870 (Court Fees Act), section 10—Court fee—Abandonment of portion of claim in respect of which the Court fee was deficient—Dismissal of suit.*

When a plaintiff in the initial stage of the litigation abandons a portion of his claim he is not compellable to pay court fees in respect of the portion abandoned under penalty of having the whole of his suit dismissed.

THE plaintiffs in this case instituted a suit for pre-emption of a sale under which five parcels of property passed. One of these parcels was one-quarter of a well. Before the Court of first instance (Officiating Additional Subordinate Judge of Aligarh) an objection was raised that the property sought to be pre-empted had been improperly valued, and eventually the well, which for pre-emptive purposes had been valued at Rs. 100, was held to be worth Rs. 150. Thereupon the Subordinate Judge called upon plaintiffs to pay the deficient court fee on the extra Rs. 50. This the plaintiffs refused to do, and abandoned their claim to the well. Whereupon the Subordinate Judge, professing to act under section 10, clause (2), of the Court Fees Act, dismissed the entire suit. The plaintiffs appealed. The lower appellate Court (Additional District Judge of Aligarh) reversed the decree of the Additional Subordinate Judge and remanded the suit under section 562 of the Code of Civil Procedure for

1904

NABI  
MUHAMMAD  
v.  
JWALA.

1904  
July 14.

\* First Appeal No. 44 of 1904, from an order of J. H. Cuming, Esq., Additional Judge of Aligarh, dated the 11th of February 1904.



1904

RAM  
PRASAD  
v.  
BHIMAN.

trial on the merits. Against this order the defendants appealed to the High Court.

Babu *Satya Chandra Mukerji*, for the appellants.

Dr. *Satish Chandra Banerji* (for whom *Munshi Gokul Prasad*), for the respondents.

BLAIR and BURKITT, JJ.—This case is to some extent a matter of first impression. What happened was this. The plaintiffs (respondents) instituted a suit for pre-emption of a sale under which five parcels of property passed. The fifth of those parcels was one-quarter of a well. Before the Court of first instance an objection was raised that the pre-empted property had been improperly valued, and eventually this well, which for pre-emptive purposes had been valued at Rs. 100, was held to be worth Rs. 150. Thereupon the Munsif called upon the plaintiffs to pay the deficient court fee duty on the Rs. 50. This the plaintiffs refused to do, and abandoned their claim to the well. Thereupon the Munsif, professing to act under section 10, clause (2), of the Court Fees Act, dismissed the entire suit. On appeal the District Judge has remanded the record under section 562 for retrial. Hence this appeal. It has been contended that the order of the Munsif was right and ought not to have been disturbed. Not without a good deal of hesitation we have come to the conclusion that the order of the District Judge is right. It seems to us that when a plaintiff in the initial stage of the litigation abandons a portion of his claim, he is not compellable to pay court fees upon that claim under the penalty of having the whole of his suit dismissed. The matter is, we admit, one which is capable of argument on both sides, and it is with some hesitation that we have come to this decision. The state of things which appears in this case is manifestly one which was not considered when section 10 of the Court Fees Act was enacted. We must therefore dismiss this appeal; but at the same time we desire to say that we do not profess to approve of or indeed to comprehend the force of the learned Judge's observations as to section 373 of the Code of Civil Procedure. Section 373 is in no way in point in this case. We make no order as to costs.

*Appeal dismissed.*

*Before Mr. Justice Knox, Acting Chief Justice, and Mr. Justice Aikman.*

RAM CHARAN RAI AND OTHERS (PLAINTIFFS) v. KAULESHAR RAI

AND OTHERS (DEFENDANTS).\*

1904  
July 15.

*Joint property—Dispossession of some of the co-owners by others—Suit for recovery of joint possession—Form of decree.*

Where certain of the co-owners of immovable property had been prevented by some of the other co-owners from exercising their legal rights in respect of the joint property it was held that the dispossessed co-owners were entitled to a decree that they should be restored to joint possession of the joint property, and not merely to a decree declaring their right to joint possession. *Bhairon Rai v. Saran Rai* (1) followed. *Watson & Co. v. Ramchund Dutt* (2), and *Rahman Chaudhri v. Salamat Chaudhri* (3) referred to.

THE plaintiffs in this case came into Court alleging themselves to be owners of a one-third share in 1 bigha 17 biswas 4 dhurs of land situate in mauza Musepur appertaining to Silaich, pargana Muhammadabad. The cause of action set up by them was that "on the 15th June 1900 defendants Nos. 1 and 2 (other co-sharers), in collusion with the patwari of the mahal, prevented the plaintiff from cultivating the aforesaid land in dispute, and deny the plaintiffs' right to it." The plaintiffs asked "that by establishment of the plaintiffs' right the plaintiffs may be put in joint possession of 1 bigha 17 biswas and 4 dhurs of land \* \* \* to the extent of the plaintiffs' one-third share." The plaintiffs also claimed a certain sum by way of damages. The Court of first instance (Munsif of Muhammadaabad) found that the date of dispossession alleged by the plaintiffs was wrong, and that in fact the plaintiffs had not been in possession within twelve years of the date of suit, and accordingly dismissed the suit. On appeal the lower appellate Court (Subordinate Judge of Ghazipur) reversed the decree of the Munsif, decreed the claim for joint possession of the disputed land, and dismissed the claim for damages. The defendants appealed to the High Court urging, *inter alia*, that "the decree awarding joint possession is bad in law."

This appeal coming before a single Judge of the Court was allowed in part by the following judgment:—

"On behalf of the appellants it is objected that the decree for joint possession is wrong, and in view of the decision in *Rahman Chaudhri v.*

\* Appeal No. 37 of 1903 under section 10 of the Letters Patent.

(1) Weekly Notes, 1904, p. 106. (2) (1890) I. L. R., 18 Calc., 10.

(3) Weekly Notes, 1901, p. 48.

1904

RAM  
CHARAN  
RAI  
v.  
KAULESHAR  
RAI.

*Salamat Chaudhri* (1) I think the objection is sound. I modify the decree of the lower Court only in this respect, that I set aside the decree for joint possession, as it seems to me that decree might in execution be considered to be one giving the respondents a right to some sort of physical possession over the property in suit, and in lieu thereof I give a decree as in the case just cited, declaring that the plaintiffs respondents are owners of one-third of the property in dispute. I make no order as to costs."

Against this judgment the plaintiffs preferred an appeal under section 10 of the Letters Patent.

Munshi *Gobind Prasad* for the appellants.

Munshi *Haribans Sahai* for the respondents.

KNOX, Acting C. J.—This is a Letters Patent appeal. The judgment from which the appeal has been brought was passed before the Full Bench judgment of this Court in *Bhairon Rai v. Saran Rai* (2) was delivered. The finding of fact in this case is that the plaintiffs have been in possession of the disputed land within twelve years and have been dispossessed by the defendants. This being so, the Full Bench ruling quoted above applies, and I am bound to follow it. The result will be that I would decree this appeal.

AIKMAN, J.—I am of the same opinion. Our learned colleague relies on his decision in the case of *Rahman Chaudhri v. Salamat Chaudhri*, (1). Like my brother Banerji (*vide* his judgment in the Full Bench case of *Bhairon Rai v. Saran Rai*), I am not prepared to agree with some of the observations contained in the judgment in *Rahman Chaudhri v. Salamat Chaudhri*. In the latter judgment the learned Judge apparently takes it for granted that a decree for joint possession would entail the eviction of the defendants from some portion of the property. With all deference to my learned colleague I do not see that this would follow. The Full Bench case has decided that there can be a decree directing a plaintiff to be put back into joint possession of land which he was previously in joint possession and from which he had been evicted. In his judgment in the Full Bench case the learned Chief Justice speaks of the decree passed in that case as one which merely declared that the plaintiff was entitled to be restored to joint possession. I have referred to the decree

(1) Weekly Notes, 1901, p. 48.

(2) Weekly Notes, 1904, p. 106.

in that case, and I find that it was not merely a decree declaring the plaintiff's right to be restored to possession but one decreeing his claim to be restored. If a decree can be passed to put back a plaintiff into joint possession, I see no reason why it should be considered impossible to pass a decree for joint possession in the case of a plaintiff who has never been in possession. Whether such a decree ought to be passed is another question. In the Privy Council case *Watson & Co. v. Ram Chand Datt* (1) it was contended on the part of the plaintiffs that they were entitled to a decree ordering them to be put into joint possession with the defendants. Their Lordships of the Privy Council in dealing with this contention never suggest that such a decree could not be passed. They say:—"It appears to their Lordships that the plaintiffs have not established a right to have such a decree." On the findings of the learned Subordinate Judge in this case, the facts are on all fours with the Full Bench case of *Bhairon Rai v. Saran Rai*. I think that this appeal should be allowed.

BY THE COURT.

The order of the Court is that the appeal is decreed with costs; the decree under appeal is set aside, and that of the Subordinate Judge is restored.

*Appeal decreed.*

[NOTE.—Cf. *Jagar Nath Singh v. Jai Nath Singh*, *supra*, p. 88—ED.]

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.*

RAHIM-UD-DIN (DEFENDANT) v. RAM LAL (PLAINTIFF).\*

*Execution of decree—Sale in execution set aside and purchase money returned*

*—Sale confirmed on appeal—Suit by decree holder to recover purchase money—Civil Procedure Code, section 244.*

A sale held in execution of a decree for money was set aside on application by the judgment-debtor under section 311 of the Code of Civil Procedure and the purchase money was returned. On appeal, however, the order setting aside the sale was reversed and the sale was confirmed in favour of the original purchaser. The purchaser, however, did not pay the sale price, and the

\* Second Appeal No. 463 of 1903, from a decree of C. Steel, Esq., District Judge of Shahjahanpur, dated the 19th of February 1903, confirming a decree of Babu Bans Gopal, Munsif of Budann West, dated the 28th of August 1902.

(1) (1890) I. L. R., 18 Cal., 10.

1904

RAM  
CHARAN  
RAI  
v.  
KAULESHAR  
RAI.

1904  
June 3.

1904

RAHIM-UD-  
DIN  
v.  
RAM LAL.

decree-holder accordingly sued him for its recovery. *Held* that the suit did not lie, but the matter was one governed by section 244 of the Code of Civil Procedure. *Gulzari Mal v. Madho Ram* (1), followed.

ONE Ram Lal, the plaintiff in the suit out of which this appeal arose, held a simple money decree against one Nasir-ud-din. In execution of this decree Ram Lal caused certain immovable property of his judgment-debtor to be brought to sale, and it was purchased by one Rahim-ud-din on the 20th of March 1899 for the sum of Rs. 384-14-3. The judgment-debtor applied to have this sale set aside on the ground of certain irregularities in the conduct thereof, and on the 22nd of July 1899 the sale was set aside, and the purchase money, which had been paid, was returned to the purchaser. The decree-holder appealed against the order setting aside the sale, with the result that on the 14th of September 1899 the appeal was allowed, the order setting aside the sale was annulled, and the sale was confirmed. The purchaser, however, did not obtain possession nor apply for a certificate of sale, and apparently did not then wish to complete the sale. The decree-holder accordingly instituted the present suit to compel the purchaser to pay the sale consideration. The Court of first instance (Munsif of West Budaun) decreed the plaintiff's suit, and this decree was upheld in appeal by the District Judge of Shahjahanpur. The defendant thereupon appealed to the High Court.

Mr. *Ishaq Khan*, for the appellant.

Munshi *Ratan Chand* and Munshi *Govind Prasad*, for the respondent.

STANLEY, C.J., and BURKITT, J.—In view of the decision of a Full Bench of this Court in the case of *Gulzari Mal v. Madho Ram* (1) this appeal must be allowed. One Ram Lal held a simple money decree in suit No. 438 of 1898 against one Nasir-ud-din. Nasir-ud-din was possessed of a 5-biswa share in certain property, and in execution of the decree of Ram Lal this share was put up for sale, and was purchased by Rahim-ud-din, the defendant appellant, on the 20th of March 1899, for the sum of Rs. 384-14-3. The judgment-debtor applied to have the sale set aside on the ground of alleged irregularities in the conduct of the sale under section 311 of the Code of Civil

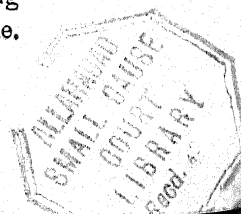
(1) (1904) I. L. R., 26 All., 447.



Procedure, and on the 22nd of July 1899 the sale was set aside and the purchase money which had been paid was returned to the purchaser. The decree-holder appealed against the order setting aside the sale, with the result that on the 14th of September 1899 the appeal was allowed, and the order setting aside the sale was annulled and the sale confirmed. Rahim-ud-din, however, did not obtain possession or apply for a certificate of sale, and it is stated by his learned pleader that he does not desire to carry out the sale or obtain possession of the property. The suit out of which this appeal has arisen was brought by Ram Lal, the decree-holder, to compel Rahim-ud-din to repay with interest the money representing the price of the property which had been returned to him. The prayer is somewhat vague. It does not ask that the money should be paid to the plaintiff, but merely prays that the purchase money with interest "may be awarded against the defendant" together with costs of the suit. Now it appears to us obvious that, having regard to the ruling of the Full Bench in the case to which we have referred, this suit cannot be maintained. The subject-matter of the suit was clearly a matter coming within the purview of sub-section (c) of section 244 of the Code of Civil Procedure, and an independent suit ought not to have been brought. It was a matter relating to the execution and discharge of the decree. The course which the plaintiff ought to have adopted was to have applied to the court executing the decree to call upon the defendant to redeposit in court the purchase money of the property. This being so, the decrees of the lower Courts cannot stand. It is said by the learned vakil for the respondent that to allow this appeal will entail great hardship upon his client, seeing that the appellant is the purchaser and owner of the property under an order of the Court, the sale to him having been confirmed, and yet has not paid the purchase money. We cannot, however, in this appeal deal with this matter. We may observe, however, that the appellant has not obtained a sale certificate, and according to the statement of his learned pleader it is not his intention to apply for such certificate or to take possession of the property. If he do so without first paying the purchase money, serious consequences for him may ensue.

1904

RAHIM-UD-  
DIN  
v.  
RAM LAL.



- 1904

RAHIM-UD-  
DIN  
v.  
RAM LAL.

Be this, however, as it may, it appears to us that, having regard to the express provisions of section 244, we cannot uphold the decision of the lower Courts and must carry out the law regardless of possible hardship. We therefore allow the appeal, set aside the decrees of the lower courts, and dismiss the suit; but having regard to the fact that in instituting the suit the plaintiff may have been misled by earlier rulings of this Court which are in conflict with the decision of the Full Bench to which we have referred, and seeing that the appellant is somewhat to blame in the matter, we pass no order as to the costs of the appeal in this and the lower appellate Court and of the suit.

*Appeal decreed.*

1904  
July 2.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burdett.*

GATTI LAL AND OTHERS (DEFENDANTS) v. BIR BAHADUR SAHAI  
AND OTHERS (PLAINTIFFS).\*

*Civil Procedure Code, section 295—Execution of decree—Suit for refund of assets wrongly distributed.*

D held a simple money decree against S. P held a decree under section 90 of the Transfer of Property Act against S. personally and as representative of R, the original decree for sale having been passed against S and R jointly. D realized in execution of his decree a sum of Rs. 1,100 by sale of property belonging to S alone. *Held* that P was entitled to a rateable distribution of the assets so realized under the provisions of section 295 of the Code of Civil Procedure. *Gonesh Das Bagria v. Shiva Lakshman Bhakat* (1) followed.

IN the suit out of which this appeal arose the defendants were holders of a simple money decree against one Sripat Narain Singh. The plaintiffs obtain a decree for sale on a mortgage against Sripat Narain Singh and Raghupat. The mortgaged property failed to satisfy the mortgage debt, and accordingly an application was made under section 90 of the Transfer of Property Act, and a decree passed for the balance of the money which remained unpaid. This decree under section 90 was passed against Sripat Narain Singh personally and also as representative of Raghupat, who was then dead. Subsequently the defendants realized a sum of Rs. 1,100 by sale of property

\* Second Appeal No. 770 of 1903, from a decree of Mr. Muhammad Ishaq Khan, District Judge of Azamgarh, dated the 21st July 1903, reversing a decree of Babu Murari Lal, Munsif of Muhammadabad-Gohna, dated the 29th of May 1903.

(1) (1903) I. L. R., 30 Cal., 583.

which had been attached in execution of their decree as belonging to Sripat alone, and only Sripat's interest in it was sold. The plaintiffs sued to recover from the defendants the share of these assets, to which they claimed to be entitled on a rateable distribution thereof. The Court of first instance (Munsif of Muhammadabad-Gohna) on a construction of section 295 of the Code of Civil Procedure held that the suit did not lie, and accordingly dismissed it. The plaintiffs appealed, and the lower appellate Court (District Judge of Azamgarh) reversed the Munsif's decision, and gave a decree in favour of the plaintiffs. The defendants thereupon appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellants.

Babu *Surendra Nath Sen*, for the respondents.

STANLEY, C. J., and BURKITT, J.—This appeal raises a question upon the true construction of section 295 of the Code of Civil Procedure. The suit was brought by the plaintiffs under the provisions of that section to recover a rateable share of a sum of Rs. 1,100 alleged to have been realized by sale of the property of a common judgment-debtor. Hira Lal, the father of the appellants, obtained a simple money decree against Sripat Narain Singh. The respondents obtained a decree for sale on a mortgage against Sripat Narain Singh and Raghupat. The mortgaged property was insufficient to satisfy the mortgage debt, and an application was made under section 90 of the Transfer of Property Act, and a decree passed for the balance of the debt which remained unpaid. This decree under section 90 was passed against Sripat personally and also as representative of Raghupat, who was then dead. Subsequently the appellants realized the sum of Rs. 1,100 by sale of property which had been attached in execution of their decree as belonging to Sripat alone, and only Sripat's interest was sold. It was out of this sum so realized that rateable contribution is sought by the plaintiffs here. The question which then arises is as to whether or not the plaintiffs are entitled to a rateable share of this money, their judgment-debtors being Sripat and Raghupat, whilst the appellants' judgment-debtor was Sripat alone. This question came before a Full Bench of the Calcutta High Court, consisting of the Chief Justice and five of the learned puisne Judges, and

1904

GATTY LAL  
v.  
BIR BAHADUR SINGH.

1904

GATTI LAL  
v.  
BIR BAHADUR SINGH.

was carefully considered (*Gonesh Das Bagria v. Shiva Lakshman Bhakat*, (1)). We have read the judgments of the learned Chief Justice and Mr. Justice Banerjee, and we entirely concur in the view expressed by them and by the other concurring Judges. In that case a party obtained a decree against three judgment-debtors, whilst another person obtained a decree against two only of these judgment-debtors. It was held that the person who held a decree against two judgment-debtors only was entitled under the provisions of section 295 to have a proportionate distribution of the money realized by the sale of property of the three judgment-debtors so far as the money was realized from his own judgment-debtors. This being our view, this appeal fails. It is dismissed with costs.

*Appeal dismissed.*

1904  
July 11.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burdett.*

MUBARAK HUSAIN (PLAINTIFF) v. KANIZ BANO AND OTHERS  
(DEFENDANTS).\*

*Pre-emption—Muhammadan law—Talab-i-istishhad—Reference to the previous talab-i-mawasibat necessary.*

When in asserting a claim for pre-emption under the Muhammadan law the making of the *talab-i-istishhad* is required, it is absolutely necessary that at the time of making this demand references should be made to the fact of the *talab-i-mawasibat* having been previously made, and this necessity is not removed by the fact that the witnesses to both demands are the same. *Abid Husen v. Bashir Ahmad* (2) and *Rujjub Ali Chopedar v. Chundi Churn Bhadra* (3) followed. *Chotu v. Husain Bakhsh* (4) referred to. *Sahibzadi v. Alahdiya* (5) and *Nundo Pershad Thakur v. Gopal Thakur* (6) dissented from.

THE plaintiff in this case brought a suit for pre-emption of certain property against his nephew, his nephew's wife, and their vendees, his claim being based both on the provisions of the *wajib-ul-arz* and on the Muhammadan law. The Court of first instance (Additional Subordinate Judge of Saharanpur) found as regards the first plea that on a construction of the *wajib-ul-arz* the plaintiff was not entitled to pre-empt, and as regards the

\* Second Appeal No. 1071 of 1902, from a decree of R. P. Dewhurst, Esq., District Judge of Saharanpur, dated the 5th of June 1902, confirming a decree of Maulvi Muhammad Siraj-ud-din, Additional Subordinate Judge of Saharanpur, dated the 15th of December 1900.

(1) (1903) I. L. R., 30 Calc., 583.

(2) (1898) I. L. R., 20 All., 499.

(3) (1890) I. L. R., 17 Calc., 543.

(4) Weekly Notes, 1893, p. 101.

(5) Weekly Notes, 1902, p. 147.

(6) (1884) I. L. R., 10 Calc., 1008.

second that the plaintiff had failed to comply with the essential formalities of the Muhammadan law of pre-emption. It accordingly dismissed the plaintiff's suit. On appeal the lower appellate Court (District Judge of Saharanpur) affirmed the decree of the lower Court. The plaintiff appealed to the High Court, challenging the decision of the lower Courts on both points, though apparently his plea relating to the construction of the *wajib-ul-arz* was not pressed before the High Court. As to the question of Muhammadan law, the findings of fact of both the lower Courts were that the two demands, the *talab-i-mawasibat* and the *talab-i-istishhad*, had been made, but that on the occasion of the making of the second demand there had been no reference to the prior *talab-i-mawasibat*. The witnesses, however, to both demands were the same, and it was argued that, this being the case, in making the second demand it was not necessary to refer specifically to the making of the first.

Babu *Durga Charan Banerji*, for the appellant.

Pandit *Sundar Lal*, for the respondents.

STANLEY, C. J., and BURKITT, J.—This is an appeal in a pre-emption suit founded on Muhammadan law. There is one point, and one point only, for decision in it. That point is—when a pre-emptor after making the *talab-i-mawasibat* in the presence of witnesses takes those same witnesses with him to the vendee and there makes the *talab-i-istishhad*, but does not when making the *talab-i-istishhad* refer to the former immediate demand, has he thereby fully conformed to the condition of the Muhammadan law? The two lower Courts have answered this in the negative. The learned District Judge says:—“In this case the lower Court found that the evidence showed that both formalities had been carried out, but that the second formality had been fulfilled in a defective manner, as no mention was made at the time when the *talab-i-istishhad* was made of the fact that the immediate demand had already been made.” Further on, after expressing its own agreement with the opinion expressed by the Court of first instance, the lower appellate Court lays down that “the omission to refer to the first formal demand is not rectified by the fact of the witnesses being the same on both occasions.” In these conclusions we fully concur.

1904

MUBARAK  
HUSAINv.  
KANIZ  
BANO.



1904

MUBARAK  
HUSAIN  
v.  
KANIZ  
BANO.

It was so laid down by our brother Aikman in the case of *Abid Husen v. Bashir Ahmad* (1), the head-note to which case runs as follows.—“When in asserting a claim for pre-emption, the making of the *talab-i-istishhad* is required, it is absolutely necessary that at the time of making this demand reference should be made to the fact of the *talab-i-mawasibat* having been previously made, and this necessity is not removed by the fact that the witnesses to both demands are the same.” In his judgment our brother Aikman refers to a Full Bench ruling of the Calcutta Court in the case of *Rujjub Ali Chopedar v. Chundi Churn Bhadra* (2), which overruled an earlier judgment of that Court in the case of *Nundo Pershad Thakur v. Gopal Thakur* (3). In the latter case it was held that if the witnesses of both demands were the same, it was unnecessary to refer, when making the second demand, to the fact that the first demand had been made. In the Full Bench case it was held that “it is absolutely necessary that at the time of making this demand (*i.e.*, the second demand) reference should be made to the fact that the *talab-i-mawasibat* had been previously made, and this necessity is not removed by the fact that the witnesses to both demands are the same.” We can well understand why the law in this respect should be so strict. The second demand is not made for the information of the witnesses, but for the information of the vendee or vendor, to whom it happens to be made. If the witnesses to both the immediate and second demands be the same, it naturally does seem unnecessary to repeat the same thing to them; but then at the second demand not only may the same witnesses be present, but also a third party, namely, the vendee or vendor must be present, and it is for his information that at the second demand reference is required to be made to the fact that the first and immediate demand had been made. The only authority against this view of the law which has been cited to us is that of *Chotu v. Husain Bakhsh* (4). To that case our brother Aikman, to whose judgment in the later case we have referred, was a party. In another case—*Sahibzadi v. Alahdiya Khan* (5)—our brother

(1) (1898) I. L. R., 20 All., 499.

(3) (1884) I. L. R., 10 Calc., 1008.

(2) (1890) I. L. R., 17 Calc., 543.

(4) Weekly Notes, 1893, p. 101.

(5) Weekly Notes, 1902, p. 147.

man, with another learned Judge of this Court, was a party to a judgment affirming practically the judgment in the case of *Abid Husen v. Bashir Ahmad*. So that the weight of authority of this Court is in favour of the view taken in the last-mentioned case, and the authority of the Calcutta High Court also favours the same view. In view of this preponderance of authority we are not prepared to hold that the view expressed by the lower appellate Court is incorrect. We must therefore, affirming it, dismiss this appeal with costs.

*Appeal dismissed.*

1904

MUBARAK  
HUSAIN  
v.  
KANIZ  
BANO.

*Before Mr. Justice Blair and Mr. Justice Burkitt.*  
MAHESH PRASAD AND OTHERS (PLAINTIFFS) v. RANJOR SINGH  
(DEFENDANT).\*

1904  
July 13.

*Civil Procedure Code, section 13—Res judicata—Estoppel—Suit in Civil Court for ejectment of defendant as a trespasser—Effect of previous litigation in Revenue Courts.*

Plaintiffs applied to a Rent Court to eject defendant, alleging that he was their tenant, but their application was ultimately rejected on the finding that defendant was either the owner or a rent-free tenant of many years standing. Again plaintiffs applied for enhancement of rent in respect of the same land from which they had previously sought to eject plaintiff, but were again defeated on the finding that the defendant was in adverse possession. Subsequently plaintiffs sued in the Civil Court to eject defendant as a trespasser. Held that the plaintiffs were not debarred from having recourse to the Civil Court. *Baldeo Singh v. Imdad Ali* (1), distinguished.

THE facts of this case are as follows:—

In April 1896 the plaintiffs applied to a rent court for dis-possession of the defendant, alleging that he was their tenant. The defendant resisted the application, denying that he was a tenant, and asserting that he was the owner of the fields the subject of the notice. The Assistant Collector gave the plaintiffs an order for ouster of the defendant, but on appeal to the Collector that order was set aside as to fields Nos. 1166 and 1168. The Collector found that the defendant was either the owner or a rent-free tenant of many years standing. The plaintiffs apparently submitted to the order of the Collector,

\* First Appeal No. 10 of 1904, from an order of Syed Muhammad Ali, District Judge of Jaunpur, dated the 28th of November 1903.

(1) (1893) I. L. R., 15 All., 189.

1904

MAHESH  
PRASAD  
v.  
RANJOB  
SINGH.

but afterwards they made an application to have rent assessed on the two plots Nos. 1166 and 1168. This application was refused by the Assistant Collector, who found the defendant to be in adverse possession of those two plots. The plaintiffs then instituted the present suit in the Civil Court asking for the ejectment of the defendant as a trespasser, not only in respect of plots Nos. 1166 and 1168, but in respect of two other plots Nos. 1160 and 1167. The Court of first instance (Munsif of Jaunpur) dismissed the suit altogether. But on appeal the District Judge, whilst upholding the finding of the lower Court as to plots Nos. 1160 and 1168, remanded the suit under section 562 of the Code of Civil Procedure for decision on the merits as regards the other two plots. The plaintiffs thereupon appealed to the High Court against the order of remand.

Pandit *Sundar Lal* and Munshi *Gokul Prasad*, for the appellants.

Munshi *Mangal Prasad Bhargava*, for the respondent.

BURKITT, J.—This is an appeal against an order of remand under section 562 of the Code of Civil Procedure, passed by the learned Judge of Jaunpur. The suit in which the order was passed was one for ejectment preferred by the plaintiffs appellants against the defendant on the allegation that the latter was a trespasser. Before entering into the facts of this appeal, I would refer to certain previous litigations which took place between these parties. In April 1896 the plaintiffs applied to a Rent Court for dispossession of the defendant, alleging that he was their tenant. The defendant resisted their application, denying that he was a tenant, and asserting that he was the owner of the fields, the subject of the notice. The Assistant Collector gave the plaintiffs an order for ouster of the defendant, but on appeal to the Collector that order was set aside as to the fields Nos. 1166 and 1168. The Collector found that the defendant was either the owner or a rent-free tenant of many years' standing. The plaintiffs apparently submitted to the order of the Collector, but afterwards they made an application to have rent assessed on the two plots Nos. 1166 and 1168, mentioned above. This application was refused by the Assistant Collector who found the defendant to be in adverse

possession of those two plots. The present suit was instituted in January 1903. It prays that the defendant Ranjor Singh be ejected from possession of the two fields Nos. 1166 and 1168, and also from some other fields. The Court of first instance dismissed the suit. On appeal the learned District Judge, for reasons which commended themselves to him, has apparently confirmed the judgment of the first Court as to the fields Nos. 1166 and 1168, but remanded the record, under section 562, as regards the other fields. Now, as to this order of remand, I may at once say it is bad and cannot stand. In the case of *Banwari Lal v. Samman Lal* (1), it has been distinctly laid down that section 562 of the Code of Civil Procedure authorizes a remand only where the entire suit, and not merely a portion of it, has been disposed of by the Court below on a preliminary point. That decision has been followed in several subsequent cases in this Court and in other Courts. We have no doubt that it is a correct exposition of the law. Applying it therefore to this case, it is clear that the remand order made by the learned Judge is a bad order and it must be set aside.

As to the merits of the case, the learned Judge, after setting out at length the previous litigations, continues thus:—"It has been urged on behalf of the defendant that the two decisions of the Rent Courts alluded to above bar the present suit under section 13 of the Code of Civil Procedure, and also that the plaintiffs, having more than once admitted that the defendant was their tenant, cannot now turn round and say that he was a trespasser."

Now in this view of the law, I am of opinion that the learned District Judge is in error. Section 13 of the Code of Civil Procedure, as has been frequently laid down by this and other courts, only applies in cases where the Court whose decision is cited as a *res judicata* was competent to try the second case. This suit, being a suit in ejectment for dispossession of a trespasser, is one which no Rent Court could try. It follows therefore that no decision of a Rent Court can, as a *res judicata*, bar the hearing of this suit.

1904

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MAHESH  
PRASAD  
v.  
RANJOR  
SINGH.

(1) (1889) I. L. R., 11 All., 488.

1904

MAHESH  
PRASAD  
v.  
RANJOR  
SINGH.

The case cited by the learned District Judge is in no way in point. The case is that of *Baldeo Singh v. Imdad Ali* (1). The facts in that case are very different from this. In that case the plaintiffs served notice on the defendants under section 36 of the Rent Act and treated them as their tenants. So far therefore as the plaintiffs and the defendants were concerned, the relation existing between them was stated by the plaintiffs to be that of landlord and tenant. In the course of the proceedings in the Rent Court it was held by that court that the defendants in that case were occupancy tenants, that is to say, the Rent Court, the only court empowered in that behalf, made the declaration that the defendants were the occupancy tenants of the plaintiffs. It is in this respect that the case differs from the one now before us. In that case the plaintiffs did not submit to the order of the Rent Court, but instituted a suit in a Civil Court. That suit was practically nothing more or less than an appeal from the decision of the Rent Court, as it prayed a Civil Court to eject the defendants as trespassers. It was held in the case just cited that a Civil Court had no power to touch a matter in which the Rent Court alone was the competent tribunal. In the present case, however, it is different. The plaintiffs have submitted to the decision of the Rent Court, accepting its finding that the defendant is not a tenant, and they have now come to the Civil Court, asking that court to eject him as a trespasser. In this way this case differs *in toto* from the case in 15 Allahabad. Here we have the plaintiffs accepting the order of the Rent Court and asking further relief from the Civil Court in pursuance of that order, while in the case in 15 Allahabad we had a plaintiff attempting to contest in the Civil Court an order which the Rent Court alone was empowered to pass. The two cases are in no way similar. I have no hesitation in ruling that neither that case nor section 13 of the Code of Civil Procedure has any bearing on the present case. I must hold that the District Judge was entirely wrong in deciding that a portion of the claim in this suit was barred by *res judicata*. Therefore, setting aside the decree of the lower Court and the order of remand, which is

(1) (1893) I. L. R., 15 All., 189.



manifestly an improper order, I would decree this appeal and direct the record to be returned through the District Judge to the Court of first instance to be replaced on the file of pending suits and decided on the merits.

I think the appellant is entitled to his costs of this appeal.

BLAIR, J.—I concur.

BY THE COURT.

It is ordered that this appeal be allowed, that the order of remand of the lower appellate Court be set aside, and that the record be remanded under section 562 of the Code of Civil Procedure through the lower appellate Court to the Court of first instance to be replaced in its original number on the file of pending suits and decided on the merits. The defendant respondent must pay the costs of this appeal; the other costs will follow the event.

*Appeal decreed.*

1904

MAHESH  
PRASAD  
v.  
RANJOR  
SINGH.

*Before Mr. Justice Blair and Mr. Justice Burkitt.*

JAGAN NATH (PLAINTIFF) v. BHAWANI AND ANOTHER (DEFENDANTS).  
*Act (Local) No. II of 1901 (Agra Tenancy Act), section 202—Question of tenant right in Civil Court—Question decided by Civil Court—Appeal—Procedure.*

1904  
July 15.

Where in contravention of the provisions of section 202 of the Agra Tenancy Act, 1901, a Civil Court heard and determined a suit in which a question of tenant right was raised, and on appeal the lower appellate Court remanded the suit under section 562 of the Code of Civil Procedure, it was held that the lower appellate Court ought not to have remanded the case, but should itself have passed the order required by section 202 of the Tenancy Act, and the High Court made such an order.

In this case the plaintiff, a zamindar, brought a suit in the Court of the Munsif asking for the ejectment as trespassers of certain persons from lands in their possession situate in mauza Alapur. The defendants pleaded that under titles accruing in various manners they were occupancy tenants of the lands in suit, and denied that the plaintiff had any right to eject them. The Court of first instance (Munsif of West Bundann) tried the suit, and finding against the defendants upon all the issues fixed, gave a decree in favour of the plaintiff.

\* First Appeal No. 57 of 1904, from an order of C. D. Steel, Esq., District Judge of Shahjahanpur, dated the 9th March 1904.

1904  
JAGAN  
NATH  
v.  
BHAWANI.

The defendants appealed. The lower appellate Court (District Judge of Shahjahanpur), holding that the Munsif ought to have taken action under section 202 of the Agra Tenancy Act, 1901, remanded the case to that court under section 562 of the Code of Civil Procedure. Against the order of remand the plaintiff appealed to the High Court.

*Dr. Tej Bahadur Sapru*, for the appellant.

*Maulvi Muhammad Ishag*, for the respondents.

BLAIR and BURKITT, JJ.—The facts of this case are as follows. The plaintiff appellant, Pandit Jagan Nath, who is admittedly zamindar of mauza Alapur, sued four persons, the defendants, respondents here, praying that they should be ejected from certain lands in their possession in that village, the plaintiff alleging that they were trespassers and had no right to continue in cultivation of the land. To this the defendants pleaded that under titles accruing in various manners they were occupancy tenants of the land in question, and denied the plaintiff's title to eject them. The Court of first instance fixed four issues for trial, and in very careful judgment, in which it came to a finding on all the issues fixed, decided in favour of the zamindar. On appeal the learned District Judge remanded the case under section 562 of the Code of Civil Procedure to be determined "in accordance with law." Hence this appeal. The order of remand clearly cannot be supported. There was no preliminary point decided by the Court of first instance, nor did the learned District Judge reverse the decision of the first court on any such point. The course which both Courts should have adopted is clearly pointed out in section 202 of the Agra Tenancy Act, No. II of 1901. That section provides:—"If in any suit relating to an agricultural holding instituted in a Civil Court" (this suit has reference to an agricultural holding, and has been instituted in a Civil Court) "the defendant pleads that he holds the land as the tenant of the plaintiff" (this is the plea raised by the defendants here) "the Civil Court shall by order in writing require the defendant to institute within three months a suit in the Revenue Court for the determination of such question." These latter words point out the course which the Court below should have adopted. The

judgment of the Munsif is no doubt very excellent and gives good reasons for all the findings at which he arrived, but unfortunately for him section 202 of the new Act deprives him of jurisdiction to hear such a case until after the expiry of the time allowed to the defendant within which he should institute a suit in the Rent Court. For the above reasons we must set aside the decisions of the two lower Courts, and we direct by order in writing that the defendants respondents Bhawani, Tundi, Chiddu and Musammat Lachman be required to institute within three months from this date a suit in the Revenue Court for the determination of the question raised by them in their written statement. We make no order as to costs.

1904

JAGAN  
NATH  
v.  
BHAWANI.

*Appeal decreed.*

*Before Mr. Justice Blair and Mr. Justice Burdett.*  
PAHLWAN SINGH AND ANOTHER (DEFENDANTS) v. RAM BHAROSE  
(PLAINTIFF).\*

1904

July 15.

*Possession—Title—Nature of merely possessory title.*

A person whose title to immovable property rests upon mere possession is competent to deal with such property as if he were the owner, and his acts will be good as against all persons other than the true owner. If such a possessor executes a registered deed of gift of the property, he is subject to the rule that no one can derogate from his own grant. *Govind Prasad v. Mohan Lal* (1) followed. *Phul Chand v. Lakshu* (2) referred to.

THE facts out of which this appeal arose are as follows:—

One Lochan Singh died some sixteen or eighteen years before suit, leaving a widow Raj Kunwar and an infant son Tilok Singh. At the time of his death Lochan Singh was owner in possession of a  $2\frac{1}{2}$ -biswa share in mauza Alinagar and a 3-biswa share in mauza Kansua. After Lochan Singh's death, Tilok Singh's name was entered in respect of one-half only of the property left by his father, and the widow's (Raj Kunwar's) name was entered in respect of the other half. Tilok Singh died some nine or ten years before suit, and the name of his widow Surja Kunwar was entered in

\* Second Appeal No. 493 of 1903 from a decree of L. Stuart, Esq., District Judge of Fatehgarh, dated the 6th of May 1903, reversing a decree of Maulvi Syed Muhammad Tajammul Husain Khan, Subordinate Judge of Farrukhabad, dated the 10th December 1902.

(1) (1901) I. L. R., 24 All., 157.

(2) (1903) I. L. R., 25 All., 358.

1904

PAHLWAN  
SINGH  
v.  
RAM  
BHAROSE.

respect of the property standing in his name. On the 23rd of March 1898, Raj Kunwar made a gift, by means of a registered instrument, of the half share in respect of which her name was entered in favour of Ram Bharose, her step-daughter's son, but she did not get mutation of names effected in favour of the donee, but, on the contrary, remained in possession as before. On the 6th June 1902, Raj Kunwar sold the whole of the property in question to her nephew Pahlwan Singh and her son-in-law Godhan by means of a registered sale deed; she put the vendees in possession and got mutation of names effected in their favour. Hence the present suit, which was brought by the donee Ram Bharose to recover possession from the vendees Pahlwan Singh and Godhan. The Court of first instance (Subordinate Judge of Farrukhabad) dismissed the suit, holding that the plaintiff had acquired no title under the deed of gift executed in his favour by Raj Kunwar. On appeal by the plaintiff the lower appellate Court (District Judge of Farrukhabad) reversed the decision of the Subordinate Judge and decreed the plaintiff's claim. The defendants vendees appealed to the High Court.

Messrs. *W. K. Porter* and *W. Wallach*, for the appellants.

*Babu Jogindro Nath Chaudhri* and *Pandit Sundar Lal*, for the respondent.

BLAIR and BURKITT, JJ.—In our opinion this case is governed by the decision of a Bench of this Court in the case of *Govind Prasad v. Mohan Lal* (1). The facts are briefly as follows:—On the death of her husband Lochan Singh, leaving an only son, his widow Musammat Raj Kunwar in some way or other was recorded as the owner of half the property left by her husband, and would seem to have obtained possession. The son was recorded as owner of the other half. The widow having thus got possession has retained that possession for many years. The husband, we are informed, died more than 20 years before the institution of this suit. The possessory title she thus acquired is a title which is good against all the world except the true owner. In this litigation the true owner has not appeared. The possessory title she thus acquired

(1) (1901) I. L. R., 24 All., 157.

Musammat Raj Kunwar, on the 23rd of March 1898, granted by deed of gift to the plaintiff respondent Ram Bharose a minor child, and she completed his title by executing a registered deed in his favour. The registration of this deed of gift, as ruled by this Court in the case of *Phul Chand v. Lakkhu* (1) completed the title of the donee; and, if it be true that the donor remained in possession, it must be held that her possession thenceforth was that of the minor donee. Subsequently, by a deed of sale, dated the 6th of June 1902, Musammat Raj Kunwar purported to sell to two men, Pahlwan and Godhan, both of them being relatives of her own, but not of her husband, the possessory title of which she had already made a gift to the plaintiff. Thereupon these two vendees proceeded to oust Musammat Raj Kunwar and her donee from possession of the property in dispute and took possession of it themselves. Hence this suit, which has been brought by a guardian of the minor to recover possession of the property. The lower appellate Court has given a decree in favour of the plaintiff, and we think that decree is right. The possession which Musammat Raj Kunwar had of the property was, as we have already stated a possession good against all the world but the true owner, and, as held in the case of *Govind Prasad v. Mohan Lal* (2), she was in possession of an estate which she might dispose of in any way as if she had an absolute indefeasible title to it. Having once disposed of the whole of that estate by gift to the plaintiff, it was no longer in her power, in derogation of the gift, to sell the same property to the defendants. That sale gave them no title whatever to possession of the property or to eject the donee. The law on this subject will be found fully set forth in the case cited above. For the above reasons we think the decision of the Court below was right. We therefore dismiss this appeal with costs.

1904

PAHLWAN  
SINGH  
v.  
RAM  
BHAROSE.

*Appeal dismissed.*

(1) (1903) I. L. R., 25 All., 358.

(2) (1901) I. L. R., 24 All., 157.



1904  
July 18.

## MISCELLANEOUS CRIMINAL.

*Before Mr. Justice Knox, Acting Chief Justice.*

IN THE MATTER OF THE PETITION OF MITHU KHAN\*.

*Criminal Procedure Code, sections 110, 112, 190, 191 and 526—Transfer—  
Security for good behaviour.*

Where a Magistrate refused to admit to bail a person against whom proceedings were pending under section 110 of the Code of Criminal Procedure on the ground that "the accused is said to be a dangerous and violent man who might use his liberty for the purpose of intimidating witnesses," the High Court declined to direct a transfer of the proceedings. Magistrates are left a very wide discretion as to the kind of information upon which they may act in instituting proceedings under Chapter VIII of the Code, and they are not bound to disclose its source. The provisions of section 190 (c) and section 191 do not apply to such proceedings.

In this case one Mithu Khan was called upon to show cause why he should not be bound over to be of good behaviour. Pending the proceedings under Chapter VIII of the Code of Criminal Procedure, he was arrested, and when he applied to be enlarged on bail, bail was refused on the ground that he was "said to be a dangerous and violent man who might use his liberty for the purpose of intimidating witnesses." Mithu Khan applied to the High Court for the transfer of the proceedings pending against him to some other court, upon the ground that the action taken by the Magistrate indicated some prejudice against the applicant; and it was further urged that inasmuch as the Magistrate's order indicated that he had received some private information, other than the information contained in the report of the Police Sub-Inspector who was in charge of the case, the accused was entitled under the provisions of section 190 (c) and section 191 of the Code of Criminal Procedure to have his case transferred to some other court.

Mr. G. W. Dillon and Babu Satya Chandra Mukerji, for the applicant.

The Government Advocate (Mr. A. E. Ryves), for the Crown.

KNOX, Acting C. J.—This is an application praying for the transfer of certain proceedings under section 110 of the Code of Criminal Procedure which are pending in the court of the Joint Magistrate of Mirzapur, and in which such

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\* Miscellaneous No. 119 of 1904.

Magistrate has required one Mithu Khan to show cause why he should not be ordered to execute a bond for good behaviour.

Even if I were to accept the affidavit as being a good and proper affidavit, all that it discloses pertinent to the matter before me is that upon an application made for the release of Mithu Khan on bail, the Joint Magistrate recorded the following order:—"Refused, as the accused is said to be a dangerous and violent man who might use his liberty for the purpose of intimidating witnesses." Further, that the affirmant from this order and refusal of bail believes that the Magistrate has acted on information received informally and unofficially. For this reason the accused does not expect a fair and impartial trial.

Section 110 of the Code of Criminal Procedure lays down that whenever a Magistrate empowered to do so receives information that a person is one of the class from whom security for good behaviour should be required he is to make an order in writing setting forth the substance of the information received. The words used are as wide as possible, there is no limit as to the nature of the information, no limit as to the source from which it may be derived. It is obvious that if a Magistrate is to set out for the information of the person summoned the names of the persons for whom he receives information and the nature of the information given, very few self-respecting persons in this country would dream of placing any information at the disposal of the Magistrate. It is not as if this information were any evidence against the person concerned; this of course it can never be. The substance of the information informs the person concerned what is the matter upon which he has to show cause. To infer that because the Magistrate has heard this information, and has reduced it to writing, that therefore he is prejudiced and biased against the person summoned and there is no likelihood or hope of the person informed against getting an impartial hearing is to cast a slur upon the Magistrate, which I am not prepared to do. The Magistrate has been particularly guarded in his language; he is careful to say "*is said to be* a dangerous and violent person who might use, etc." The learned vakil who appears for Mithu Khan argued strenuously that if

1904

IN THE  
MATTER  
OF THE  
PETITION  
OF  
MITHU  
KHAN.

1904  
IN THE  
MATTER  
OF THE  
PETITION  
OF  
MITHU  
KHAN.

the Magistrate had received information otherwise than in either of the forms set out in section 190 of the Code of Criminal Procedure, he was bound to inform Mithu Khan that he was entitled to have the matter heard by another court. No authority has been shown to me for this, and I am not prepared without authority to apply the provisions of section 190 to limit by them the wide and unfettered language used in sections 110 and 112 of the Code of Criminal Procedure. Nothing has been shown to me from which I could rightly infer that the person informed against will not get a fair and impartial trial.

I reject the application.

1904  
July 21.

## APPELLATE CIVIL.

*Before Mr. Justice Blair and Mr. Justice Burkitt.*

BASAWAN KURMI (DEFENDANT) v. NAKCHHEDI PANDE (PLAINTIFF).\*

*Suit for "maintenance" of possession—Pleadings—Cause of action—Suit virtually to procure rectification of an erroneous decree.*

Plaintiff in a suit for possession as usufructuary mortgagee of 13 bighas had to redeem five prior usufructuary mortgages comprising part of the 13 bighas mortgaged to him and some 15 bighas in addition: but the decree which he obtained was drawn up erroneously and gave the plaintiff a right to the possession of 13 bighas only, and not of the whole 28 bighas. Plaintiff never appealed against this decree, nor did he apply in review to have the error in the decree corrected, but he subsequently brought a suit in which he asked, first, for "maintenance" of possession in respect of the 15 bighas, and, secondly, for recovery of possession, if he should be found not to be in possession. He alleged in his plaint that he was in possession and that one of the defendants at the instigation of another was interfering with his rights. It was found that plaintiff had never obtained possession of the 15 bighas. *Held* that the suit did not lie. If the suit was for maintenance of possession no cause of action appeared, and in any other view the suit was one virtually to set right an erroneous decree, which could not be done by means of such a suit.

The facts of this case are as follows:—

One Nakchhedi was mortgagee from Parmeshar Kurmi and others of 13 bighas of land under a usufructuary mortgage-deed of the 26th of March 1901. The land being subject to a prior

\* Second Appeal No. 726 of 1903, from a decree of L. Marshall, Esq., District Judge of Ghazipur, dated the 16th of May 1903, reversing a decree of Rai Anant Ram, Subordinate Judge of Ghazipur, dated the 31st of January 1903.

mortgage held by one Gobind Singh, dated the 29th of July 1878, Nakchhedi sued to redeem that mortgage. At the hearing of the suit it was objected on behalf of Gobind Singh that he was the holder of four other mortgages ranging from December 1886 to October 1900, and he claimed that those mortgages must also be redeemed before the plaintiff could redeem the mortgage of the 29th of July 1878. These four mortgages affected an area of 15 bighas, besides part of the 13 bighas comprised in the mortgage of the 26th of March 1901. Nakchhedi obtained a decree for redemption conditional on his paying the sum of Rs. 5,276-14-0 to Gobind Singh, that being the sum adjudged payable for redemption of the five mortgages held by the latter. Nakchhedi paid that money into Court and afterwards applied in execution to be put into possession of the whole 28 bighas. To this it was objected that under the decree Nakchhedi was only entitled to possession of 13 bighas, which in fact was the case, the decree having been wrongly framed. Nakchhedi never attempted to get the decree put right, but brought a suit for maintenance of possession of the 15 bighas, alleging that he had lawfully obtained possession thereof, but that, at the instigation of Gobind Singh, one Basawan Kurmi had interfered with the plaintiff's possession and prevented him from ploughing. The plaintiff asked for a decree for "maintenance of possession," but with an alternative prayer that if he was found to have been dispossessed, a decree for possession might be given. The Court of first instance (Subordinate Judge of Jaunpur) dismissed the plaintiff's suit, but that decree was on appeal reversed by the District Judge.

The defendant thereupon appealed to the High Court.

Mr. *Abdul Majid*, for the appellant.

Mr. *Agarwala* and Pandit *Sundar Lal*, for the respondent.

BLAIR and BURKITT, JJ.—This is an appeal from a decree of the District Judge of Ghazipur reversing the decision of the Subordinate Judge of that district, who had dismissed the plaintiff's suit. In paragraph 4 of the plaint it is alleged that the plaintiff had lawfully obtained possession of 15 bighas odd of land and had it cultivated, but that at the instigation of defendant No. 2, namely, one Gobind Singh, the defendant

1904

BASAWAN  
KURMI  
v.  
NAKCHHEDI  
PANDE.

1904

BASAWAN  
KURMI  
v.  
NAKCHHEDI  
PANDE.

No. 1, one Basawan Kurmi, interfered with plaintiff's possession and prevented him from ploughing. The plaint then goes on to claim that the plaintiff is entitled to "retain possession" of the land as representative of defendant No. 2, Gobind Singh, and in the prayer for relief the plaintiff asked for a decree for "maintenance of possession" in respect of the 15 bighas odd and goes on to say that "if in the opinion of the Court it is deemed proper to pass a decree for recovery of possession, then a decree for recovery of possession may be passed." Now the facts found by the lower courts as regards the allegations in the plaint are that the plaintiff was never in possession of the land in suit, and therefore was never ejected. Those are findings of fact behind which in second appeal we cannot go. Paragraph (b) of the prayer for relief asked for any other relief, but this we think must be some relief arising out of the cause of action. Now the cause of action as set forth here was lawful possession of a certain area of land by the plaintiff and unlawful dispossession of the plaintiff therefrom by the defendant. The Courts have found that no such cause of action ever accrued. That being so, in our opinion the suit fails and should have been dismissed, and for that reason we allow this appeal, and, so far as the defendant appellant Basawan is concerned, we dismiss the plaintiff's suit, restoring so far the decree of the Subordinate Judge.

The cause of action set forth above, we may add, was entirely abandoned at the hearing by the learned advocate for the respondent. He took his stand on certain proceedings which ended in a decree for redemption, dated the 18th of March 1902, and on those proceedings he contended that his client was entitled to retain the decree now under appeal. The facts attending those proceedings are that the plaintiff, Nakhedi, was mortgagee from Parmeshar Kurmi and others of 13 bighas of land under a usufructuary mortgage-deed of the 26th of March 1901. The learned District Judge is wrong in saying that Basawan was one of those mortgagors and was their "fighting man." The land being subject to a prior mortgage held by one Gobind Singh, dated the 29th of July 1878, Nakhedi sued to redeem that mortgage. At the hearing of the suit it was objected



on behalf of Gobind Singh that he was a holder of four other mortgages ranging from December 1886 to October 1900, and he claimed that those mortgages must also be redeemed before the plaintiff could redeem the mortgage of the 29th of July 1878. Those four mortgages admittedly affected an area of 15 bighas and also a part of the 13 bighas affected by the mortgage of the 26th of March 1901. Nakchhedi obtained a decree for redemption conditionally on his paying the sum of Rs. 5,276-14-0 to Gobind Singh, that being the sum which the Court adjudged him to pay for redemption of the five mortgages, that is to say, the mortgage of 1878 and the four other subsequent mortgages. Nakchhedi paid that money into court on the 17th of June 1902, and six days afterwards he applied in execution to be put into possession of the 13 bighas and of the 15 bighas. It was objected that under the decree of the Court he was entitled to possession of the 13 bighas only. On inspection of the decree this turned out to be correct, as the court which passed the redemption decree had by some blunder omitted to give Nakchhedi a decree for possession as mortgagee of the 15 bighas. The plaintiff's application was accordingly rejected as far as the 15 bighas were concerned. Now at that time on the passing of that order there were two courses open to Nakchhedi. If he considered the execution court had wrongly interpreted the redemption decree, he might have appealed against that order under section 244, or if he considered that the decree was wrong, as it manifestly was, in not giving him possession as mortgagee of the 15 bighas, he might either have appealed against the decree as it stood or have applied to the Court in review to amend the blunder apparent on the face of the decree. He did neither, but has instituted this suit, in which on a false allegation of facts he asked for recovery of possession of the 15 bighas, and it is to be noted he does not ask for possession of that area as mortgagee, but apparently asks for proprietary possession, to which he certainly would not be entitled, even if the redemption decree had been properly framed. It appears to us then that this present suit is virtually a suit, the object of which is to have the redemption decree amended and to have the order in execution refusing possession of the 15 bighas set aside. Such a

1904

BASAWAN  
KURMI  
v.  
NAKCHHEDI  
PANDE.

1904

BASAWAN  
KURMI  
v.  
NAKCHHEDI  
PANDE.

suit is in our opinion entirely misconceived and not maintainable. We are unable in any way to concur with the view of the law taken by the District Judge in this matter, while, on the other hand, we think the view taken by the Subordinate Judge is correct.

Therefore, for these reasons as well as those given in : earlier part of this judgment, we allow this appeal as far as the appellant Basawan Kurmi is concerned. We set aside the decree of the lower appellate court, and to the same extent we restore the decree of the court of first instance, dismissing the plaintiff's suit with costs in all courts.

*Appeal decreed.*

1904  
July 21.

*Before Mr. Justice Blair and Mr. Justice Burdett.*  
RUGAD SINGH (PLAINTIFF) v. SAT NARAIN SINGH AND OTHERS  
DEFENDANTS.\*

*Act No. IV of 1882 (Transfer of Property Act), sections 60, 83, 95—Redemption of mortgage—Clog on equity of redemption—Parties to suit for redemption—Effect of payment of mortgage money into Court.*

After the execution of a usufructuary mortgage the mortgagor executed a bond, which, in addition to the usual stipulation for repayment of the money secured thereby, contained a covenant to the effect that the mortgaged property should not be redeemed until the principal money and interest due under the bond had been paid off.

*Held* that such a provision amounted to a clog or fetter on redemption placing in the way of the mortgage a bar to the exercise of the right of redemption which the law gave him, and therefore a provision not to be enforced. *Shoo Shankar v. Parma Mahton* (1), followed.

*Held* also that where the purchaser of part of the equity of redemption comes into court seeking to redeem the whole mortgage, and pays into court the entire amount due at the time upon that mortgage, the rights of a purchaser of another portion of the equity of redemption claiming only to redeem his proportionate share in the mortgage, cannot be dealt with in that suit, for upon payment by the plaintiff of the full amount due the mortgage has ceased to exist.

This was a suit for redemption of a mortgage brought by the purchaser of a portion of the equity of redemption. The plaintiff asked for redemption of the whole mortgage and, under the

\* Second Appeal No. 853 of 1903, from a decree of J. Sanders, Esq., District Judge of Benares, dated the 19th of May 1903, confirming a decree of Babu Man Mohan Sanyal, Munsif of Benares, dated the 10th of December 1902.

(1) (1904) I. L. R., 25 All., 559.

1904

RUGAD  
SINGH  
v.  
SAT NARAIN  
SINGH.

provisions of section 83 of the Transfer of Property Act, 1882, paid into Court the whole amount then due under the mortgage. When notice of this deposit was given to the mortgagees they objected, not that the deposit was insufficient, that they held certain simple money bond given by the mortgagors, and that this bond had to be paid off before the mortgage could be redeemed. Amongst the defendants was one Shakal Narain Singh, who pleaded that he was the purchaser of a five-sixth share of the equity of redemption, and prayed that he might be made a plaintiff and given a decree for redemption of his share. The plaintiff on his part objected to Shakal Narain Singh being made a plaintiff, his cause of action and the relief sought by him being different from the cause of action of and the relief sought by the original plaintiff. The Court of first instance (Munsif of Benares) passed a decree for redemption, first in favour of the plaintiff, and, secondly, in favour of the defendant, Shakal Narain Singh, conditional in each case on the plaintiff, or Shakal Narain Singh, paying, in addition to the amount due upon the mortgage in suit, the amount secured by the simple money bond set up by the mortgagees defendants. On appeal by the plaintiff the lower appellate Court (District Judge of Benares) affirmed the decree of the Munsif. The plaintiff thereupon appealed to the High Court.

Pandit *Sundar Lal* and Munshi *Gokul Prasad*, for the appellant.

The Hon'ble Pandit *Madan Mohan Malaviya*, Dr. *Satish Chandra Banerji*, Munshi *Gulzari Lal* and Dr. *Tej Bahadur Sapru*, for the respondents.

BLAIR and BURKITT, JJ.—This is an appeal against a decision of the learned District Judge of Benares in a suit for possession of certain property on redemption of a mortgage executed on the 7th of September 1869. The plaintiff, Rugad Singh, is assignee by purchase of a portion of the equity of redemption. As such he was a person entitled to redeem the whole mortgage. Accordingly with a view to so doing he, on the 29th of May 1901, under the provisions of section 83 of the Transfer of Property Act, deposited in Court a certain sum of money, which in the course of these proceedings has been found, and at the

1904

RUGAD  
SINGH  
v.  
SHAKAL NARAIN  
SINGH.

hearing of this appeal was admitted by the learned vakil for the respondent, to be sufficient to discharge the sum due on the mortgage mentioned above. Notice of the deposit having been served on the mortgagees, they declined to accept it as sufficient, not because it was insufficient to pay off the amount due on the mortgage of the 7th of September 1869, but because they claimed payment of the amount due on a simple money bond of the 24th of July 1874. Their claim was that the amount due on that bond should be paid off before the mortgage of the 7th September 1869 could be redeemed. Hence this suit for possession, to which one Shakal Narain Singh, alleged to be the purchaser of other portions of the equity of redemption, was made a party. This person, when impleaded as a defendant, alleged in his defence that he had been impleaded without any reason, that he owned a five-sixth share in the equity of redemption, that he wished to obtain redemption of the property sought to be redeemed by paying a sum proportionate to his share, and that the plaintiff was not entitled to obtain redemption of the share belonging to him. Finally he asked that he should be added as a co-plaintiff to the suit and given an opportunity of obtaining redemption of his share. The plaintiff Rugad Singh refused to consent to this man being added as a co-plaintiff, and we think rightly, for the plaintiff and this Shakal Narain Singh had not the same cause of action. Each of them had a separate cause of action, the plaintiff by his purchase of a share in the equity of redemption from one Sher Ali, and Shakal Narain by his purchase from other sharers in that equity. The causes of action were different, and the relief they sought was not the same. The plaintiff sued for possession of the whole property on redemption of the whole mortgage, and rightly so sued, while Shakal Narain desired only to redeem his share. In the lower Courts two points were decided, first that this property could not be redeemed until the bond of July the 24th, 1874, had been paid off, and, secondly, that Shakal Narain was entitled to a decree for redemption of five-sixths of the property. The plaintiff Rugad Singh appeals against these decisions.

We will first take up the question as to whether the bond of the 24th of July 1874 had the effect of postponing redemption

of the mortgage of 1869 until it had been paid off. We think both the lower Courts were wrong in their decision on this point. We have carefully considered the provisions of the bond of the 24th of July 1874 which is described by the parties to it is as a 'simple bond.' It provides, no doubt in very strong language, as follows:— "Therefore we agree that the principal and the interest due under this simple bond shall be paid before the amount due on the usufructuary mortgage is paid. The creditor may refuse to accept payment of the amount due under the usufructuary mortgage bond before the amount due under the simple bond is paid up." It is contended that these words, coupled with words of almost exactly similar import at the conclusion of the mortgage-deed of September 1869, create a charge on the mortgage property, and that that charge according to the contract made by the parties must be paid off before redemption of the bond of 1869. In our opinion it does not create any charge, and amounts to no more than a clog or fetter on the equity of redemption. It seems to us that this case is entirely governed by the decision of a Bench of this Court in the case of *Sheo Shankar v. Parma Mahton* (1). In that case it was held that provisions in a bond resembling very much those in the bond before us, were a clog or fetter on redemption placing in the way of the mortgagor a bar to the exercise of the right of redemption which the law gave him, and therefore provisions which could not be enforced. We can see no distinction between the facts of that case and the case before us. We are bound by the rule of law laid down in it, and following that rule we must hold that the Courts below were wrong in the conclusion they arrived at, that the bond of 1874 must be paid off before usufructuary mortgage of 1869 can be redeemed.

As to the second point also, that is to say, the right of Shakal Narain to a redemption decree *in this suit*, we think the lower Courts are wrong. When the plaintiff deposited the sum which is now admitted to have been the full amount then due on the mortgage of 1869, the effect of that payment was in our opinion to satisfy and discharge the mortgage fully. Thenceforth there was no longer any subsisting mortgage which could be enforced

1904

RUGAD  
SINGH  
v.  
SAT NARAIN  
SINGH.

(1) (1904) I. L. R., 26 All., 559.



1904

RUGAD  
SINGH

v.

SHAKAL NARAIN  
SINGH.

or redeemed. Nothing further remained to be done by the mortgagor depositor but to take possession of the mortgaged property if the mortgagee consented, or, in case of a refusal, to sue for possession of that property. The mortgage, we hold, had been satisfied, and therefore no longer existed. The plaintiff as a part owner of the equity of redemption was fully justified by law in redeeming the whole mortgage; in fact it is doubtful whether he could have done otherwise than redeem the whole. Shakal Narain, the alleged holder of another portion of the equity of redemption, did not make his appearance on the scene until after the mortgage had, in our opinion, been satisfied. Therefore when in his written statement he prayed to be allowed to redeem his share of the mortgage of September 7th, 1869, he asked for redemption of that which did not then exist. We think that, having deposited under section 83 the full amount due on the mortgage, the plaintiff appellant Rugad Singh thereby became entitled to possession of the entire mortgaged property and is now entitled to a decree for possession of it. As to that property he will of course hold as absolute proprietor, whatever may have been his fractional interest in the equity of redemption, and as to the rest he will hold, as laid down by this Court, as lienor, liable to be paid off in respect of it by anyone entitled to the equity of redemption on payment of an amount of the mortgage money proportionate to the share of that person and of the expenses properly incurred by the plaintiff in redeeming and obtaining possession, as is provided by section 95 of the Transfer of Property Act. We do not say what Shakal Narain's interest is. His learned advocate contended that he was entitled to five-sixths and that the District Judge had said so. Such, however, is not the case. The meaning of the Judge is clear. He was setting forth the claims made by the respective parties, and mentioned that Shakal Narain had claimed a five-sixth share, but the Judge came to no conclusion as to that matter. It is not a question which could be decided in this suit. We trust that Shakal Narain and the plaintiff appellant will be able to come to an amicable arrangement as to the amount to be paid to the plaintiff by Shakal Narain to liberate his interest from the charge given to the plaintiff by section 95 of the

Transfer of Property Act. For these reasons we modify the decision of the two lower Courts, we set aside as much of the order of those Courts as directs the bond of 1874 to be paid before the redemption of the mortgage of 1869, and we further set aside as much of the decision of those Courts as gives the defendant respondent, Shakal Narain a decree for redemption of five-sixths of the property. In substitution for those orders we, finding that the deposit made by the plaintiff appellant under the provisions of section 83 is admittedly sufficient to redeem the mortgage of the 7th of September 1869, give the plaintiff appellant a decree for possession of the whole of the property affected by that mortgage and for mesne profits from the 29th of May 1901, the date on which the plaintiff appellant made his deposit in Court under section 83 of the Transfer of Property Act, up to the date on which he obtains possession, the amount to be ascertained in the Execution Department. The plaintiff appellant is entitled to his costs of this appeal against both sets of respondents and in both the lower Courts.

*Decree modified.*

1904

RUGAD  
SINGH  
v.  
SAT NARAIN  
SINGH.

*Before Mr. Justice Blair.*

MUHAMMAD ABDUL HAI AND ANOTHER (PLAINTIFFS) v. NATHU  
(DEFENDANT).\*

1904  
July 22.

*Act (Local) [No. III of 1901 (U. P. Land Revenue Act), sections 56 and 86—Cess—Rent—Payment recorded in wajib-ul-arz as 'muhtarifa.'*

*Held* that certain dues recorded as payable to the zamindars by a class of residents in the *abadi* other than agricultural tenants, and described in the village *wajib-ul-arz* as '*muhtarifa*' were payments to be made by way of rent, and not cesses such as required the general or special sanction of the Local Government for their validation.

THE plaintiffs in this case sued as zamindars of the village of Tibri in the district of Moradabad to recover from the defendants the sum of Rs. 4-8-0 as rent due to them for three years in respect of a dwelling-house and a store-house occupied by him in the *abadi* of the said village. The claim was based upon village custom recorded in the *wajib-ul-arz*. The Court

\* Second Appeal No. 400 of 1903, from a decree of Babu Mata Prasad, Subordinate Judge of Moradabad, dated the 29th of January 1903, confirming a decree of Maulvi Mubarak Husain, Munsif of Nagina, dated the 29th of September 1902.

1904

MUHAMMAD  
ABDUL HAI  
v.  
NATHU.

of first instance (Munsif of Nagina) held that the so-called rent claimed by the plaintiffs was in reality a cess not recoverable unless sanctioned by the Local Government; but it nevertheless allowed the plaintiffs' claims to the extent of annas 8, the defendant having admitted that this amount was due by him. On appeal by the plaintiffs the lower appellate Court (Subordinate Judge of Moradabad) dismissed the appeal, finding that the '*muhtarifa*' claimed by the plaintiffs was not rent but a 'profession tax,' and not exigible without the sanction of the Local Government. The plaintiffs appealed to the High Court.

Dr. Tej Bahadur Sapru, for the appellants.

Munshi Gokul Prasad, for the respondent.

BLAIR, J.—This appeal raises a question whether certain persons of the Chhipi caste and occupation residing in a village *abadi* are bound to pay to the zamindars certain specified sums by way of rent. The village appears to have two classes of occupants, and two only. The one, no doubt the large body, are agricultural tenants, who are entitled to occupy houses in the *abadi* as an incident of their tenure of agricultural land, and that class is not liable to pay any rent. It is plain to see as a practical question that the rent which is paid by them, nominally only for their zamindari land, is really and substantially paid by them for their agricultural land and the incidents attaching thereto, one of those incidents being a right to occupy houses in the *abadi*. The other class—Chhipis—are liable to make an annual payment, which is called in the *wajib-ul-arz* '*muhtarifa*.' That is a word which is very commonly in use in Madras and Bombay. It indicates, among other things, a trade tax. There are cases in which there is a poll-tax, a tax upon certain occupations, a tax upon looms and a tax upon tradesmen's shops. That word, however, is not a word which has currency in this district, nor has it been shown to one that it has any ascertained meaning. This population of Chhipis is an excrescence of the village community, and it would be surprising if the agricultural tenant, by virtue of his holding bound to pay some consideration directly or indirectly, should be in a worse position than the Chhipis, who, upon the contention of

the defendant, are not bound to pay any rent at all and have acquired a right to perpetual occupation of the land. The Chhipi brings nothing in to the zamindar in any way except the small payment described in the wajib-ul-arz as '*muhtarifa*,' which, in my opinion, only means rent paid by anybody other than agricultural tenant. The contention is that the payment is by way of cess. It seems to me clear that the primary notion of a cess is a payment, not for the benefit of the landlord, but a payment for some purpose of public convenience, such as sanitation, police, and the like. It would appear that the Land Revenue Act of 1901 has attributed to the word 'cess' a meaning quite different from that which is ordinarily attached to it. It speaks of a cess as something payable by tenants on account of the occupation of agricultural land. I confess I should like to be told by some definition or competent authority what is meant by the word 'cess' in that section of the Act. But all these words 'rent,' 'cess' and so forth, must be interpreted with reference to the meaning attached to them at the time for which these payments are claimed and for the period during which this wajib-ul-arz made before the passing of the new Act was the authority for the village custom. I see no reason to doubt that the payment to be made by the respondent here was of the nature of rent. That being so this appeal must be decreed with costs. The judgments of the courts below are set aside, and the case will be remanded under the provisions of section 562, Civil Procedure Code, through the court of first appeal to the court of first instance for restoration to its original number in the register and trial upon the merits. Other costs to abide the event.

*Appeal decreed and cause remanded.*

1904

MUHAMMAD  
ABDUL HAI  
v.  
NATHU.

1904  
July 25.

*Before Mr. Justice Blair and Mr. Justice Barkitt.*

DURGA PRASAD AND ANOTHER (PLAINTIFFS) v. PURANDAR SINGH  
AND OTHERS (DEFENDANTS).\*

*Act No. VII of 1870—(Court-Fees Act) section 17—Court-fee—"Distinct subjects"—Pre-emption—Suit for pre-emption of two villages out of a larger number conveyed by the same sale deed.*

The plaintiffs sued for pre-emption of shares in two villages out of a larger number sold in one and the same transaction. They paid court-fees on their plaint calculated on five times the aggregate amount of the Government revenue payable by each of the two villages. *Held* that this was a proper mode of calculation. The two villages were not "distinct subjects" within the meaning of section 17 of the Court-Fees Act, 1870, and court-fees were not therefore leviable in respect of each village separately. *Chamaili Rani v. Ram Dai* (1), *Mul Chand v. Shih Charan Lal* (2) and *Sukra v. Tafazzul Husain Khan* (3) followed.

THE plaintiffs in this case sued for pre-emption of shares in two villages, which had been sold along with other villages to persons, some of whom, according to the plaintiffs, were strangers. For the purpose of paying the court fee on their plaint the plaintiffs calculated the amount of the purchase money attributable to the two villages which they desired to pre-empt, and the amount of the Government revenue assessable on those villages; then, adding together the latter two sums, they paid on the plaint the court fee assessable on five times that amount. The plaint was passed as correct by the Munsarim, but when the defendants appeared they took exception to the court fee paid by the plaintiffs, contending that it ought to have been calculated on each village separately, under section 17 of the Court Fees Act. Their contention was accepted by the Court, which ordered the deficiency to be made good at once, and it was made good the same day. When the case came on for hearing, the defendants again took exception to the amount of the court fee, and pleaded that at the time the deficiency was made good the suit was already barred by limitation. The court of first instance (Subordinate Judge of Banda) upon this ground dismissed the suit, and upon appeal

\* Second Appeal No. 842 of 1903 from a decree of B. J. Dalal, Esq., District Judge of Banda, dated the 30th of July 1903, confirming a decree of Pandit Girraj Kishore Das, Subordinate Judge of Banda, dated the 9th of March 1903.

(1) (1878) I. L. R., 1 All., 552.

(2) (1880) I. L. R., 2 All., 676.

(3) (1894) I. L. R., 16 All., 401.



by the plaintiffs to the District Judge the decree of the Subordinate Judge was upheld. The plaintiffs thereupon appealed to the High Court.

Pandit *Sundar Lal* and Babu *Durga Charan Banerji*, for the appellants.

Pandit *Moti Lal Nehru* and Munshi *Gulzari Lal*, for the respondents.

BLAIR and BURKITT, JJ.—This is an appeal in the initial stage of a pre-emption suit. The suit was one for pre-emption of certain shares in two villages called Girwan and Chaksar in the district of Banda. The allegation of the plaint was that in a sale which had been made, and in which these villages were included, some of the vendees were strangers to the co-parcenary body of co-sharers of the village, and therefore the sale was bad and the plaintiffs as co-sharers in the villages possessing a right of pre-emption as such were entitled to pre-empt. Several villages were included in the sale as to which there was no right of pre-emption. Accordingly in their plaint the plaintiffs calculated the amount of the purchase money attributable to the two villages they desired to pre-empt and the amount of Government revenue assessable on those villages; then, adding together the latter two sums, they paid on the plaint the court fees assessable on five times that amount. The plaint was filed on the 2nd of July 1902. It was passed as correct by the Munsarim and was admitted on the register of regular suits and notice issued to the defendants. On the appearance of the defendants they took objection to the court fees paid on the plaint. Their objection is in these words "the plaintiff has in bad faith much underpaid the court fee. Under section 17 of Act No. VII of 1870 he should have calculated separately the court fee on five times of the revenue of each village and paid the total amount thereof as court fee. The plaintiff has illegally paid the court fee on five times the total revenue of both the villages in dispute. This suit should not be entertained because of the deficiency in the court fee." This matter was taken up by the Subordinate Judge, who, by a *rubkar*, dated the 20th of February 1903, held that the contention of the defendants was correct, and finding that the court fee paid on the plaint was

1904

DURGA  
PRASAD  
v.  
PURANDAR  
SINGH.

1904

DURGA  
PRASAD  
v.  
PURANDAR  
SINGH.

short by Rs. 7-8-0 directed the plaintiff to pay that amount into court. His order was obeyed the same day. On the 9th of March of the same year the suit came on for disposal before the successor of the Subordinate Judge who had passed the order of the 20th of February. In his judgment we find this passage :—  
“The defendants vendees, *inter alia*, pleaded that the plaint was insufficiently stamped and that the suit was barred by limitation. On the 20th February 1903, my learned predecessor finding that the court fee paid on the plaint fell short of the proper amount of court fee payable by the plaintiffs by Rs. 7-8-0 ordered the plaintiff's pleader to make up the deficiency of the court fee at once, and the plaintiff's pleader filed court-fee stamps worth Rs. 7-8-0 that very day. Now the defendant's pleader contends that as the plaint was not properly stamped on the date of the institution of the suit and the additional court fee was paid after the expiration of the period prescribed for the suit by the Indian Limitation Act, the suit is barred by limitation. On this plea raised by the defendants the learned Subordinate Judge found himself constrained to come to the conclusion that he was bound by rulings of this Court to hold that the plaint was barred by limitation. On appeal the learned District Judge came to the same conclusion, and for much the same reasons as those which commended themselves to the Subordinate Judge. The plaintiffs appeal.

The first plea argued in support of the appeal is that the plaint was properly stamped and that the two lower Courts were wrong in holding that an additional court fee was required. The objection raised by the defendants in the Court of first instance was based on the wording of section 17 of the Court Fees Act. That section provides that “where a suit embraces two or more distinct subjects, the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees to which the plaints or memorandum of appeal in suits embracing separately each of such subjects would be liable under this Act.” What has happened here is that two villages, or portions of two villages, being part of the pre-empted property, the court-fee has been calculated on five times the aggregate Government revenue and not on five times the

revenue on each separately, which makes a difference of Rs. 7-8-0 in the aggregate court-fees. Now it has been ruled by this Court in *Chamaili Rani v. Ram Dai* (1) and in *Mul Chand v. Shib Charan Lal* (2), both of which are judgments of a Full Bench, that the words "distinct subjects" in section 17 must be taken to mean "distinct causes of action." A similar view was taken by this Court in *Sukru v. Tafazzul Husain Khan* (3). The question then we have to decide, following those rulings, is, are there two distinct causes of action included in the plaint in this case? We think not. There is in our opinion one, and only one, cause of action, and that cause of action is made up of the plaintiff's right to pre-empt and the sale by other co-sharers to persons who are strangers to the village co-parcenary body. This is the whole cause of action, and it is in our opinion a single cause of action and not two distinct causes of action. The mere fact that two areas or shares of land, which formed part of the property sold by one and the same sale-deed, are situated in villages bearing different names does not in a suit for pre-emption constitute two causes of action when those areas or share are sold by one and the same conveyance. This being our opinion, we must find that both the lower Courts have been wrong in the interpretation which they put on section 17 of the Court Fees Act. We find that the amount of court fees originally paid on the plaint by the plaintiff was sufficient, and that the Subordinate Judge and after him the District Judge were wrong in dismissing the suit because of a supposed deficiency in court fees. We must therefore allow this appeal; we set aside the concurrent decisions of the two lower Courts and we remand the record through the lower appellate Court to the Court of the Subordinate Judge, to be replaced on the file of pending suits and disposed of on the merits. Under these circumstances we think the plaintiff appellants should have their costs of this appeal and the appeal in the Court of the District Judge. Other costs will follow the event.

*Appeal decreed and cause remanded.*

(1) (1878) I. L. R., 1 All., 552.

(2) (1880) I. L. R., 2 All., 676.

(3) (1894) I. L. R., 16 All., 401.

1904

DURGA  
PRASAD  
v.  
PURANDAR  
SINGH.

1904  
July 26.

*Before Mr. Justice Blair and Mr. Justice Burdett.*

BENI (DEFENDANT) v. PURAN DAS (PLAINTIFF).\*

*Construction of document—Lease—Admissibility of evidence—Dismissal of suit on account of inadmissibility of document relied on by plaintiff.*

The plaintiff sued to eject the defendant from a certain shop, basing his case upon a document put forward as a "kiraya-namah" or lease. This document was ruled inadmissible for want of registration and the plaintiff's suit thereupon dismissed. *Held* that even if the document were inadmissible in evidence, its rejection did not involve the dismissal of the plaintiff's suit.

The document in question was in the following terms :—"I take the shop on a rent of Rs. 50 per annum without any limit of time forever. .

. I shall pay the rent month by month rateably to Mahant Puran Das. .

. On non-payment of rent a right to eject the tenants shall at once accrue to the owner of the shop." *Held* that this was not a lease, nor even a counterpart of a lease, but a mere statement of the intention of the writer, which might be given in evidence for what it was worth.

This was a suit brought for ejectment of the defendant from a shop and for recovery of arrears of rent. The suit was based on a document, the material portions of which are as follows :—"I take the shop on a rent of Rs. 50 per annum without any limitation of time forever. . . . I shall pay the rent month by month rateably to Mahant Puran Das. . . . On non-payment of rent a right to eject the tenants shall at once accrue to the owner of the shop." The document bore a stamp of 8 annas. The Court of first instance (Subordinate Judge of Banda) held that this document, which it termed a "kiraya-namah," was inadmissible in evidence, as being insufficiently stamped, and also for want of registration, and so finding proceeded to dismiss the plaintiff's suit. On appeal the lower appellate Court (District Judge of Banda) held that the document, which it called a "lease," was sufficiently stamped and did not require registration. That Court accordingly set aside the decree of the Court of first instance and remanded the case under the provisions of section 562 of the Code of Civil Procedure. From this order of remand the defendant appealed to the High Court.

Munshi *Gulzari Lal*, for the appellant.

Munshi *Gokul Prasad*, for the respondent.

\* First Appeal No. 12 of 1904 from an order of B. J. Dalal, Esq., District Judge of Banda, dated the 17th of November 1903.

BLAIR and BURKITT, JJ.—This is an appeal against an order of the District Judge of Banda remanding the case for trial on the merits under the provisions of section 562 of the Code. We think the order of the District Judge was right, but not altogether for the reasons given by him. A certain document was produced before the Court of first instance, which that Court called a "kiraya-namah" and the District Judge a "lease." The Subordinate Judge held that the document in question was written on insufficiently stamped paper, as it should have been written on a stamp paper of Rs. 5 and that it should also have been registered. As to the decision that the document should have been written on a stamp paper of Rs. 5, the Collector certifies that the 8-anna stamp on which it has been written is sufficient. The Subordinate Judge, on account of non-registration and the insufficient stamp, refused to admit the document in evidence, and then, strange to say, dismissed the suit. Why he did so is not clear, for this document, whatever be its name, was produced as part of the evidence in the case, and we do not understand why, because that piece of evidence was inadmissible, the Court should have refused to take any other evidence. The District Judge decided that the document did not require to be registered, but, strange to say, he persistently throughout his judgment describes this document as a "lease." It is not a lease. It is not even a counterpart of a lease, for as there was no lease in existence, there could be no counterpart. The document is nothing more or less than a unilateral statement drawn up by the predecessor in title of the defendants, in which he sets out his intentions as to various matters. This document is not addressed to anyone. It is not accepted by anyone, and no one but the executant is a party to it. Why the Judge should describe as a lease a document to which no one is a party as a lessor we cannot understand, nor can we understand how the court of first instance described it as an agreement to pay rent. An agreement implies consent of two parties. In it we have no one but the executant, who sets out what he intended to do. We therefore think that that document was admissible, whatever may be its worth, in evidence, and the Court of first instance was wrong in

1904

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BENI  
v.  
PURAN  
DAS.



1904

BENI  
v.  
PURAN  
DAS.

rejecting it, and we also think that Court was still more in error in refusing to accept other evidence because it considered this document inadmissible. We therefore for these reasons dismiss this appeal with costs.

*Appeal dismissed.*

1904  
August 1.

## REVISIONAL CIVIL.

*Before Mr. Justice Aikman.*

MCCARRON (DEFENDANT) v. F. WELTI (PLAINTIFF).\*

Act No. IX of 1887 (*Provincial Small Cause Courts Act*), section 25

—Revision—Powers of High Court—*Civil Procedure Code*, section 622.

*Held* that the powers of revision given to the High Court by section 25 of the Provincial Small Cause Courts Act, 1887, are more extensive than those exerciseable by the Court under the provisions of section 622 of the Code of Civil Procedure as at present interpreted. *Sarman v. Khuban* (1) referred to.

IN this case the plaintiff brought a suit against the defendant in the Court of Small Causes at Mussoorie asking for damages for alleged wrongful dismissal to the extent of Rs. 499-12-0. Summons for final disposal of the suit was served on the defendant on the 2nd of May for the next day. The defendant seems not to have at once looked at the date given for appearance in the summons, and in consequence did not appear in Court on the 3rd of May. In consequence of her failure to appear a decree was passed against her *ex parte*. She applied under section 108 of the Code of Civil Procedure to have this *ex parte* decree set aside, but her application was dismissed upon the ground that, if she did not in fact, which the Judge seemed to doubt, look at the date fixed in the summons for her appearance, she ought to have done so, and had she done so, might have appeared, if only to ask for an adjournment. Against this order the defendant applied in revision to the High Court.

Mr. W. Wallach, for the appellant.

Mr. E. A. Howard, for the opposite party.

AIKMAN, J.—This is an application asking this Court to deal under section 25 of the Provincial Small Cause Courts Act

\* Civil Revision No. 24 of 1904.

(1) (1894) I. L. R., 16 All., 476.

of 1887 with a case disposed of by the Court of Small Causes at Mussoorie. The plaintiff, Mr. F. Welti, brought a suit against the applicant to recover Rs. 499-12-0 for wrongful dismissal. The applicant was served with the summons on the 2nd of May last. By the summons she was directed to appear within less than twenty-four hours from the time of service to answer the suit, and she was warned that she must be prepared to produce all her witnesses on the following day. The applicant did not appear, and an *ex parte* decree was passed against her. She applied under section 17, sub-section 1, for an order to set aside the *ex parte* decree. The application was refused, and the applicant moves this Court to set aside the order of refusal. The learned counsel for the opposite party raises a preliminary objection that this Court has no authority under section 25 of the Provincial Small Cause Courts Act to interfere, and contends that the discretion to interfere is governed by the principles embodied in section 622 of the Code of Civil Procedure. Having regard to what was said in the Full Bench case of this Court, *Sarman Lal v. Khurban* (1), I am of opinion that this Court has greater powers of interference under section 25 of the Provincial Small Cause Courts Act than it has under section 622 of the Code of Civil Procedure, at least as now interpreted. In my opinion this is a case in which I can and ought to interfere. The applicant stated on oath that she had not looked at the date in the summons. The learned Judge of the Court below is not inclined to believe this, and holds that, if she did not look at the date, she was bound to do so, and that her omission to look at the date is no excuse for her failure to attend in compliance therewith. No doubt the applicant is to blame for not having looked at the date, but, seeing that the order was for the final disposal of the suit, and that she was told to be prepared to produce all her witnesses, I think that it is very probable that it never struck her that she was being given less than twenty-four hours to do this. I think she may well have imagined she had several days, a week at least, to appear, answer and produce witnesses. In my judgment the learned Judge ought to have granted the application. But as the applicant was undoubtedly guilty of a certain

1904

McCAERON  
v.  
F. WELTI.

1904

McCARRON

v.

F. WELTI.

degree of carelessness, she must, even though that carelessness was not altogether inexcusable, pay the costs of the other side. I accordingly reverse the order of the Court below refusing to set aside the *ex parte* decree and direct the Court below to fix another date for the trial of the suit. This order is conditional on the applicant paying into the Court below all the taxed costs hitherto incurred up to this date by the plaintiff, exclusive of the court fee on the plaint. These costs must be paid in within a fortnight from the date on which this order is received in the Court below. If the costs are not paid in within the time fixed, this application will stand dismissed with costs.

1904  
August 5.

## APPELLATE CIVIL.

*Before Mr. Justice Burkitt.*

KHUDA BAKHSH (PLAINTIFF) v. AZIZ ALAM (DEFENDANT).\*

*Civil Procedure Code, section 317—Execution of decree—Suit based on the ground that the certified purchaser is not the real purchaser—Benamidar.*

One Habib Alam in execution of a decree for money against Masud Alam attached and brought to sale the one-third share of Masud Alam in certain house property, and it was purchased by Aziz Alam, the son of the judgment-debtor. Subsequently the same property was again attached and sold at the instance of Habib Alam, and this time was purchased by Khuda Bakhsh. Khuda Bakhsh was obstructed in obtaining possession of the property, and thereupon brought a suit for possession to which he made Masud Alam and others, alleged to be co-parceners in the property, parties defendants, but not the auction purchaser, Aziz Alam. Aziz Alam was, however, added as a defendant under section 32 of the Code of Civil Procedure. *Held* that to these facts section 317 of the Code was applicable and that the suit must be dismissed.

THE facts out of which this appeal arose are as follows:—

One Habib Alam obtained a decree for money against Masud Alam. In execution of that decree Habib Alam put up for sale the one-third share of Masud Alam in some house property. The property was sold by auction and was purchased by Aziz Alam, the son of the judgment-debtor. Some time after this Habib Alam attached and put up again for sale the

\* Second Appeal No. 585 of 1903, from a decree of Babu Jai Lal, Subordinate Judge of Azamgarh, dated the 23rd of April 1903, reversing a decree of Babu Murari Lal, Munsif of Muhammadabad Gohna, dated the 24th of January 1903.

same interest in the same house property which had been attached and sold under the former decree. At this second sale the property was purchased by one Khuda Bakhsh. But when Khuda Bakhsh attempted to obtain possession under his purchase, he was obstructed, and he thereupon brought a suit for possession against the decree-holder and Masud Alam and two other persons who were alleged to be co-purchasers in the house property. Aziz Alam was not originally a party to the suit, but his name was added to the array of defendants under section 32 of the Code of Civil Procedure. The Court of first instance (Munsif of Muhammadabad Gohna) decreed the plaintiff's claim, but on appeal that decree was reversed by the Subordinate Judge of Azamgarh, who found that the suit as against Aziz Alam the appellant, before him, offended against the provisions of section 317 of the Code of Civil Procedure. Against this decree the plaintiff Khuda Bakhsh appealed to the High Court.

Maulvi *Muhammad Ishaq*, for the appellant.

Mr. *Abdur Raoof* and Maulvi *Muhammad Zahur* for the respondent.

BURKITT, J.—This is in some respects a peculiar suit. One Habib Alam, who is a cousin of the defendant respondent, Aziz Alam, obtained a decree for money against Masud Alam, father of Aziz Alam. In execution of that decree he put up for sale the one-third share of Masud Alam in some house property. It was sold by auction and purchased by the defendant Aziz Alam, son of Masud Alam. The purchase money at the auction was duly deposited in Court and was paid to the decree-holder, Habib Alam. Some time afterwards Habib, probably hearing that the auction purchaser was the son of the judgment-debtor, thought that he might try to get some more money out of this property, and so he attached and put up again for sale the same interest in the same house property which had been attached and sold under the former decree. It was purchased by the plaintiff appellant, Khuda Bakhsh. When the latter attempted to obtain possession under his purchase, he was obstructed, and he thereupon brought a suit for possession against the decree-holder and against Masud Alam and two other persons who were alleged to

1904

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KHUDA  
BAKHSR  
v.  
AZIZ ALAM.

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1904

KHUDA  
BAKSH  
v.  
AZIZ ALAM.

be co-parceners in the house property. Aziz Alam was afterwards made a defendant under section 32 of the Code of Civil Procedure. The suit was decreed by the Court of first instance, but on appeal that decree was reversed by the learned Subordinate Judge, who most absurdly found that the suit was barred by the second clause of section 317 of the Code of Civil Procedure. The learned Subordinate Judge evidently failed to observe that this suit was not one to obtain a declaration. His reason therefore for dismissing the suit cannot be supported. But I am of opinion that for other reasons the suit must stand dismissed. The only defendant impleaded as a respondent to this appeal is Aziz Alam, and I have to consider the suit only as against him. Now, on the frame of the suit in the original array of parties the plaintiff, perhaps not unwisely, avoided any mention of Aziz Alam, but it was perfectly clear that, as Aziz Alam was the certified purchaser, the suit could not be fought out without his presence. He was therefore made a defendant. It was contended for the defendant before the Subordinate Judge that the suit was one which is forbidden by the first clause of section 317 of the Code. I am of opinion, though not without some slight hesitation, that such is the case. The suit as against the defendants other than Aziz Alam is not at all affected by section 317, and in fact they are only nominal defendants. But when we come to the case of Aziz Alam and look to see what is the relief which the plaintiff must be considered to seek against him, it is clear that as regards Aziz Alam, the suit can be maintained only on the ground that the purchase of the one-third share in the house property made by Aziz Alam was made on behalf of his father. The plaintiff appellant being the auction purchaser at the second sale of course could have no title against Aziz Alam if the purchase by the latter had been from his own funds and for his own purposes. But it has been found as a fact that the purchase by Aziz Alam was not a purchase for himself, but was a purchase for his father, and that the funds with which he made the purchase were supplied by his father. Aziz Alam admittedly is the certified purchaser of this property, and from what I have said above, it is clear that this suit can succeed against him only on the ground that it has been proved that the



purchase made by Aziz Alam was a *benami* purchase in his father's interest. To use the words of section 317, the suit as against Aziz Alam is maintainable only on the ground that the purchase was made on behalf of another person. That I think is the mischief aimed at by the first clause of section 317. It is perfectly clear that, unless Aziz Alam was made a party, the suit could not possibly succeed, and that on his being made a party it can succeed only on it being proved that he was *benami* for his father. That is the kind of suit which section 317 forbids. For the reasons given above, although I may say that I disagree with everything contained in the judgment of the lower Court, I must dismiss the appeal with costs.

*Appeal dismissed.*

1904

KHUDA  
BAKHSI  
v.  
AZIZ ALAM.

*Before Mr. Justice Knox, Acting Chief Justice, and Mr. Justice Aikman.*  
BABU LAL (PLAINTIFF) v. ASI KUNWAR AND ANOTHER (DEFENDANTS).  
*Act No. VII of 1870 (Court Fees Act) section 10-(2)—Court fee—Nett profits or market value wrongly estimated—Limitation.*

1904  
August 5.

Where action is taken by a Court under section 10 of the Court Fees Act, 1870, the Court is not bound, as in the case of action taken under section 54 of the Code of Civil Procedure, to fix a time within the period of limitation for the suit within which the deficiency in the Court fee must be made good, this section applying to a different stage of the suit from that contemplated by section 54 of the Code of Civil Procedure. *Valiya Kesava Vadhyar v. Suppannair* (1) followed. *Janti Prasad v. Bachu Singh* (2) and *Balkaran Rai v. Govind Nath Tiwari* (3) distinguished. *Durga Singh v. Bisheshar Dayal* (4) referred to.

THE plaintiff in this case came into Court asking, first, for the cancellation of a certain sale deed, and, secondly, for possession of the property covered by the sale deed, or, in the alternative, for a decree for maintenance of possession. The plaintiff valued the property claimed at Rs. 1,299, and stamped his plaint accordingly. One of the pleas taken in the written statement was that the property was undervalued and the plaint in consequence insufficiently stamped. An issue was framed

\* Second Appeal No. 90 of 1903 from a decree of L. Marshall, Esq., Officiating District Judge of Ghazipur, dated the 12th of December 1902, reversing a decree of Rai Anant Ram, Subordinate Judge of Ghazipur, dated the 12th of September 1902.

(1) (1880) I. L. R., 2 Mad., 303.

(2) (1898) I. L. R., 15 All., 65.

(3) (1890) I. L. R., 12 All., 129.

(4) (1902) I. L. R., 24 All., 218.

1904

BABU LAL  
v.  
AST  
KUNWAR.

on this question, and after inquiry the Court found that the true value of the property was Rs. 1,851. The Court thereupon took action under section 10 of the Stamp Act, 1870, and stayed the suit, fixing a time within which the additional court fee was to be paid in. The additional court fee was paid within the time fixed: the suit was then heard on the merits, and the Court decreed the claim, giving the plaintiff a decree for maintenance of possession, as it found him to be already in possession of the property in suit. On appeal the lower appellate Court (District Judge of Ghazipur) allowed the appeal and dismissed the suit on the ground that at the time when the additional court fee was paid by the plaintiff the suit was barred by limitation. The plaintiff thereupon appealed to the High Court.

Mr. *Abdul Majid* and *Munshi Gobind Prasad*, for the appellant.

Mr. *A. E. Ryves*, for the respondents.

KNOX, ACTING C. J.—The suit out of which this second appeal has arisen was instituted on a plaint in which the plaintiff prayed for two reliefs, first, that the sale deed, dated the 9th of March 1896, might be declared null and void as against the plaintiff and, secondly, that the plaintiff's possession might be maintained over the property covered by the sale deed; and if the plaintiff were found to be out of possession, the prayer was that the defendant be dispossessed and the plaintiff be put in possession. The plaintiff valued the property at Rs. 1,299, and he stamped his plaint accordingly. One of the pleas taken in the written statement was that the suit had been undervalued and the court fee paid was inadequate. An issue was framed on this question, and after an inquiry the Court found that the value of the land in dispute was Rs. 1,851. The Court then acting under the provisions of section 10 of the Court Fees Act stayed the suit until the additional fee rendered necessary by the Court's finding on the value of the property was paid in. The additional fee was paid in within the time fixed by the Court. The Court then heard the suit on the merits, set aside the sale deed, and finding that the plaintiff was in possession, gave him a decree for maintenance of possession only. The defendants appealed. They did not in the memorandum of

appeal take any objection to the action of the Court in fixing a time for payment of the additional court fees. It appears, however, when the case was argued in appeal before the learned Judge, a verbal objection was taken that, as the period of limitation had expired before the additional court fee was paid in, the suit should have been held barred. The learned District Judge sustained this objection, and without going into the merits, dismissed the plaintiff's suit. The plaintiff comes here in second appeal. For the respondent reliance is placed on the decisions of this Court in *Jainti Prasad v. Bachu Singh* (1), *Balkaran Rai v. Gobind Nath Tiwari* (2) and *Durga Singh v. Bisheshar Dayal* (3). This last mentioned case is in point. But it is to be noted that in that case the provisions of section 10, clause 2, of the Court Fees Act No. VII of 1870 were not referred to. I have consulted the learned Chief Justice, who was a party to this judgment, and have his authority for saying that had the attention of the Bench been called to this section, the decision might have been different. The other two cases on which reliance has been placed are distinguishable from the present case in this respect, that in one of them the plaint, and in the other the memorandum of appeal, had not been admitted when the question of the proper court fee to be paid was raised. In the present case the question of the court fee to be paid was not raised until after the plaint had been admitted and registered. The court fee paid was adequate, having regard to the value stated in the plaint. It is clear that section 54 of the Code of Civil Procedure and section 10 of the Court Fees Act have reference to different stages of a suit. In this view I find the Madras High Court agreeing, *vide Valiya Kesava Vadhyar v. Suppannair* (4). There is no suggestion here that the plaintiff fraudulently under-valued the property which he was claiming. A plaintiff may make a *bona fide* mistake as to the value of the property which he claims, and it would, in my opinion, be repugnant to justice to hold that if after an inquiry, which may be a lengthy one, and which may not be finished in time for him to pay in the additional court fee within the period of

1904

BABU LAL

v.

ASI

KUNWAR.

(1) (1893) I. L. R., 15 All., 65. (3) (1902) I. L. R., 24 All., 218.  
(2) (1890) I. L. R., 12 All., 129. (4) (1880) I. L. R., 2 Mad., 308.

1904

BABU LAL  
v.  
ASI  
KUNWAR.

limitation, the court fee paid were found insufficient, his suit should be barred. It seems to me that it was to meet a case like this that section 10 of the Court Fees Act was enacted. In my opinion the learned Judge was wrong in the view he took. I allow this appeal and remand the case for decision on the merits.

AIKMAN, J.—I agree in what has been said by the learned Acting Chief Justice. But I would also rest my opinion on another ground. The plaintiff asked for a declaratory decree and in the alternative for a decree for possession. It has been held by this Court that it is open to a plaintiff to ask in the same suit for two such reliefs. It is quite clear that when two reliefs are asked for, each may be governed by a different period of limitation. So far as the first relief, *viz.*, for declaratory decree, was concerned, the plaint was adequately stamped. But it was not sufficiently stamped to cover the second alternative relief, *viz.*, a decree for possession. The deficient court fee on the claim for possession was made good well within the period of limitation fixed for a suit for possession. This, in my view, is another reason why the order of the lower appellate Court cannot be supported. I concur in thinking that the appeal should be allowed.

BY THE COURT :—The order of the Court is that the appeal be allowed, the decree of the lower appellate Court be set aside, and the case remanded with directions to the lower appellate Court to re-admit the appeal under its original number in the register and dispose of it according to law. Costs here and hitherto will abide the result.

*Appeal decreed and cause remanded.*

1904  
August 5.

*Before Mr. Justice Blair and Mr. Justice Banerji.*

HANS RAJ (DEFENDANT) v. RATNI *alias* JWALA DEI (PLAINTIFF).<sup>\*</sup>  
*Civil Procedure Code, section 586—Suit of the nature cognizable by a Court of Small Causes—Appeal.*

The plaintiff sued as widow of a deceased Brahman priest to recover from the defendant certain books containing lists of the clients of her late husband and also a sum of Rs. 60, on the allegation that the defendant had been

<sup>\*</sup> Appeal No. 29 of 1904 under section 10 of the Letters Patent.

entrusted with the books and had realized the money as her agent for the purpose of carrying on the business of her deceased husband, and, contrary to the terms of the agency, had not handed over the money which he had obtained from the clients to her. *Held* that this was a suit of the nature cognizable by a Court of Small Causes within the meaning of section 586 of the Code of Civil Procedure.

THE plaintiff in this suit alleged that her late husband had been a priest, and as such owned several books (called *pothis*) containing lists of his clients. She herself, being a woman, was not able to carry on her husband's business in person, and had therefore handed over the books to the defendant in order that the defendant might carry on the business of *purohit* on her behalf and make over the proceeds to her. The defendant, however, had realized money from the *jujmans* and had not made it over to her according to the agreement between the parties, and the plaintiff therefore claimed restoration of the books and a sum of Rs. 60 as money realized on her behalf by the defendant from the *jujmans*. The court of first instance (Munsif of Deoband) on a construction of the agreement between the parties decreed the plaintiff's claim for the money, but dismissed it so far as restoration of the books was asked for, and this decree was confirmed by the lower appellate Court (Assistant Sessions Judge of Saharanpur with powers of a Subordinate Judge). The plaintiff appealed to the High Court, where, the appeal coming on for hearing before a single Judge of the Court, an objection was taken that the suit was one of the nature cognizable by a Court of Small Causes, and therefore appeal lay by reason of section 586 of the Code of Civil Procedure. The learned single Judge, however, held that the suit was one for rescission of a contract, and therefore not within the cognizance of a Court of Small Causes. He heard the appeal and varied the decree of the Court below by ordering restoration of the books. Against this decree the defendant preferred an appeal under section 10 of the Letters Patent of the Court.

Pandit *Sundar Lal* and Pandit *Baldeo Ram*, for the appellant.

Mr. *A. E. Ryves*, for the respondent.

BLAIR and BANERJI, JJ.—The first contention raised in this appeal is that the suit was one of the nature cognizable in

1904

HANS RAJ

v.

RATNI

alias

JWALA

DRI.



1904

HANS RAJ  
v.  
RATNI  
*alias*  
JWALA  
DEI.

a Court of Small Causes, and that, the value of the subject-matter being below Rs. 500, no second appeal lay, and that the learned Judge of this Court was wrong in entertaining the appeal. In our judgment this contention is valid. The plaintiff sued to recover possession of certain books containing lists of clients, which the plaintiff stated she had made over to the defendant. She also claimed a sum of Rs. 60, which she alleged the defendant had collected on her behalf. The claim was thus one for the recovery of movable property and of money, and was, on the face of it, of the nature cognizable in a Court of Small Causes. The learned counsel for the respondent contends that the suit came within one of three exceptions mentioned in the second schedule appended to the Provincial Small Cause Courts Act, namely, exceptions 15, 18 and 13. Exception 15 relates to suits for the specific performance or rescission of a contract. It is conceded that this is not a suit for the specific performance of a contract. The contention accepted by the learned Judge of this Court is that it was a suit for the rescission of a contract. We are of opinion that the suit cannot be regarded as one for the rescission of a contract. So far from being a suit for the rescission of a contract, the suit was brought by the plaintiff to recover money in pursuance of a contract. There is no prayer for the rescission of any contract, nor is any allegation made in the plaint from which it may be inferred that the plaintiff sought to rescind the agreement which she filed with the plaintiff if agreement it was. Article 15 therefore has no application to the case. Article 18 is still more inapplicable, as this is not a case of trust. On the contrary, the suit was brought against a so-called agent for recovery of property placed in his hands and of money received by him on the plaintiff's behalf. Article 31 cannot apply, as the suit cannot by any stretch of reasoning be said to be one for an account. The mere fact that accounts may have to be taken for the purpose of ascertaining the amount due to the plaintiff cannot give the suit the character of a suit for an account. The value of the subject-matter of the suit must be determined by reference to the value put by the plaintiff upon it in the plaint not only for fiscal purposes but also for



purposes of jurisdiction. That value in this case being below Rs. 500, section 586 of the Code of Civil Procedure forbids the entertainment of a second appeal in such a suit. We are of opinion that no second appeal lay. We accordingly allow this appeal, and, setting aside the judgment and decree of this Court, dismiss the appeal to this Court with costs.

*Appeal decreed.*

1904

HANS RAJ

v.

RATNI

alias

JWALA

DEI.

1904

May 24.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burdett.*

SARABJIT PARTAP BAHADUR SAHI AND ANOTHER (PLAINTIFFS) v.

INDARJIT PARTAP BAHADUR SAHI AND ANOTHER (DEFENDANTS).\*

*Hindu law—Family custom—Impartible raj—Evidence—Separate acquisitions of holder of impartible raj—Presumption.*

One Raja Fateh Sahi was the owner of a "raj-riasat" to which by family custom the incidents of primogeniture and impartibility applied, the younger sons receiving portions of the estate by way of "babuai" allowance. The bulk of the property of the riasat was situate in the district of Saran, but there was also a not inconsiderable portion in the district of Gorakhpur. After the battle of Buxar in 1764 the property in Saran was confiscated by the British Government; but the Gorakhpur property was then in territory belonging to the Nawab Wazir of Oudh, which was not ceded to the British Government until 1801. *Held* that the application of the customs of primogeniture and impartibility to the Gorakhpur property was unaffected by the confiscation of the property in Saran; and *semble* that even if (which, however, was found not to have been the case) the Gorakhpur property had been altogether acquired after confiscation of the property in Saran these customs, being part of the personal law of the family, would still govern such after acquired property.

It is of the essence of family usages that they should be certain, invariable and continuous, and well established discontinuance must be held to destroy them. Where, however, such a custom has been proved the onus is upon the party who alleges the discontinuance thereof to prove that fact. *Raj Kishen Singh v. Ramjoy Surma Mozoomdar* (1) and *Soorendro Nath Roy v. Mussamut Heeramonee Burmonsah* (2) referred to. But such a discontinuance was held not to be established by one instance in which a female having no title had usurped possession of the family property and had then gone through the form of making, by way of a compromise, a gift of it to the rightful heir, there being otherwise clear and consistent evidence of the existence of the custom.

A compromise between members of a Hindu family whereby "babuai" allowance is fixed and a dispute with regard to the family property is

\* First Appeal No. 214 of 1901 from a decree of Babu Ramdhan Mukerji, Additional Subordinate Judge of Gorakhpur, dated the 3rd of August 1901.

(1) (1872) I. L. R., 1 Calc., 186.

(2) (1868) 12 Moo., I. A., 81.

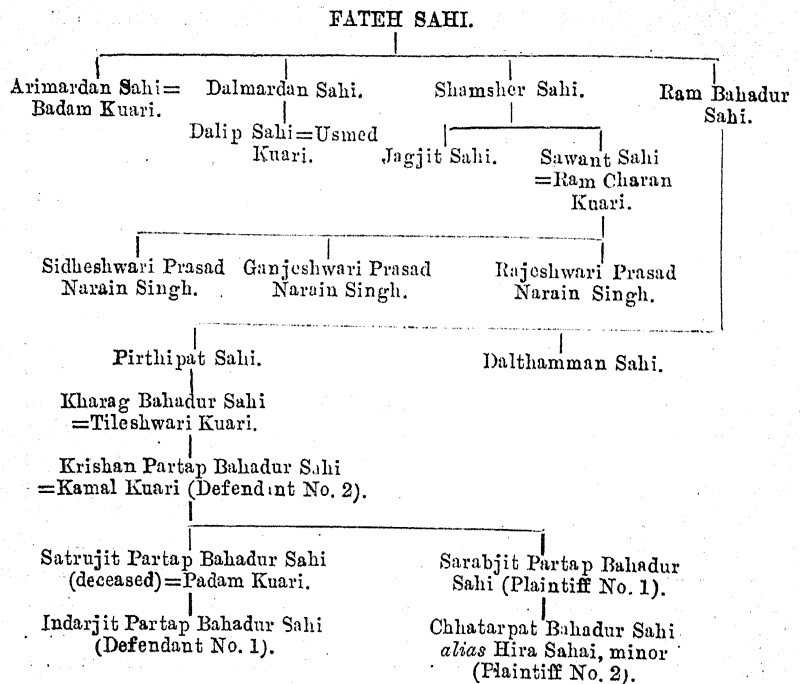
1904

SARABJIT  
PARTAP  
BAHADUR  
SAHI  
v.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

terminated will, if just and legal, be binding on the minor children of the parties thereto. *Pitam Singh v. Ujagar Singh* (1) and *Chanvirapa v. Danava* (2) referred to.

If the owner of an estate the devolution of which is governed by family custom acquires separate property, but does not in his life-time alienate the property so acquired, or dispose of it by his will, or leave behind him some indication of a contrary intention, the reasonable presumption is that he intended to incorporate it with the family estate. *Lakshmipathi v. Kandasami* (3) and *Ramasami Kamaya Naik v. Sundaralingasami Kamaya Naik* (4) referred to.

The following pedigree will illustrate the relationship between the parties to this litigation.



The suit was one for partition of a large number of villages situate in the districts of Gorakhpur, Gya and Basti, known as the Tamkoshi Raj. The plaintiffs claimed to be entitled to a share in the estate along with the defendant Indarjit Partap Bahadur Sahi by right of inheritance according to the ordinary rules of Hindu Law. They also put forward alternative claims to portions of the property described in various schedules to the

(1) (1878) I. L. R., 1 All., 651.

(2) (1894) I. L. R., 19 Bom., 593.

(3) (1892) I. L. R., 16 Mad., 54.

(4) (1893) I. L. R., 17 Mad., 422.

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHIv.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

plaint. As regards the properties mentioned in schedules B1, B2 and B3, they alleged that Kharag Bahadur Sahi, grandfather of the plaintiff No. 1, was the absolute owner of these properties, and that he shortly before his death gave a moiety of them to his wife Musammat Tileshwari Kuari; that subsequently Musammat Tileshwari Kuari acquired by purchase the properties mentioned in schedule C, and that she was entitled to the properties mentioned in schedule D under a gift from her father at the time of her marriage. They also alleged that Krishan Partap Bahadur Sahi, the father of plaintiff No. 1, acquired the properties set forth in schedule E and owned the same independently of the Raja and free from any family custom governing the devolution of the Raj. To a share in all these properties the plaintiffs laid claim as being properties of Krishan Partap Bahadur Sahi, which descended upon his death to the members of his family according to the ordinary rules of Hindu Law.

The defence of the principal defendant Indarjit Partap Bahadur Sahi, whose estate was under management of the Court of Wards, was that all the property in dispute formed part of the Tamkahi Raj; that the Raj was an impartible raj, devolving upon the death of the Raja in accordance with a well-established family custom upon the eldest son, the younger son or sons, as the case might be, obtaining maintenance in recognition of his or their rights as a Babu or Babus; that he as the only son of the late Raja Satrujit Partap Bahadur Sahi was entitled to the Raj, and the plaintiffs were only entitled to Babuana or maintenance. He also relied upon an agreement dated the 20th of July, 1805, which was entered into between his father and plaintiff No. 1 shortly after the death of their father Raja Krishan Partap, as a bar to the plaintiffs' claim. In this agreement the custom of the family was declared, namely, that after the death of the Raja occupying the gaddi his eldest son became the owner and possessor of the entire property appertaining to the Raj-riasat, and the other sons lived with and were maintained by him, but that if they wished to become separate from the Raja, they got their rights as Babus out of the property. Then it was stated that after the death of Raja Krishan Partap Bahadur

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHIv.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

Sahi, Satrujit Partap Bahadur Sahi became the occupant of the gaddi of the Raj-riasat of Tamkahi according to the practice of the family, and the owner of the whole property. Then it was agreed between the parties that Sarabjit Partap should live according to old custom with his brother and be maintained by him, but that if at any time he wished to separate from his brother, a one-eighth share of the entire property of the Raj-riasat should be given to him. It was also agreed that if Raja Satrujit should have no male issue, or if, there being male issue, they should thereafter fail, then Sarabjit and his male descendants should become the owners and occupy the gaddi of the Raj-riasat.

In the plaint this agreement was mentioned, but there was no prayer to have it set aside or cancelled. It was alleged that the minor plaintiff was no party to the same, he having been less than a month old at the date of its execution. As to plaintiff No. 1 it was pleaded that the agreement was not binding on him, the allegation being that it was without any consideration; that the consent of this plaintiff to it was obtained by undue influence, and that it was executed under a mistaken notion that there was a family custom according to which the properties formed an impartible raj.

The second defendant Musammat Ram Kamal Kuari, who was the mother of plaintiff No. 1, filed a written statement in which she supported the claim of the plaintiffs. She also laid claim to some of the villages in dispute, as well as to some other villages, under a will alleged to have been made by Raja Kharag Bahadur, the father of Raja Krishan Partap Bahadur, in favour of his wife Musammat Tileschwari Kuari, and a subsequent gift by Tileschwari Kuari to herself.

The Court of first instance (Additional Subordinate Judge of Gorakhpur) held that there was no foundation for the claim of the second defendant, and disallowed it, and she did not appeal from that decree. The Court also held that the property in dispute formed an impartible raj, and that the agreement of the 20th of July, 1895, was binding upon plaintiff No. 1, though not upon his son, he being no party to it. As regards the alternative claim of the plaintiff the Court held that all the property



mentioned in the schedules to the plaint formed part of the raj and descended in accordance with the family custom set up by the principal defendant. The suit was accordingly dismissed, and from this decree the plaintiffs appealed to the High Court.

Sir *Walter Colvin*, Babu *Jogindro Nath Chaudhri* and *Munshi Jang Bahadur Lal*, for the appellants.

The Hon'ble Mr. *Conlan*, Mr. *G. A. Wood*, Pandit *Sundar Lal* and Pandit *Moti Lal Nehru*, for the respondents.

STANLEY, C.J., and BURKITT, J.—This is an appeal against a decree of the Additional Subordinate Judge of Gorakhpur, dismissing the plaintiffs' claim. The plaintiffs are Sarabjit Partap Bahadur Sahi, younger son of the late Raja Krishan Partap Bahadur Sahi, and Chhatarpat Bahadur Sahi, his minor son; and the defendants are Raja Indarjit Partap Bahadur Sahi, the minor son of the late Raja Shatrujit Partap Bahadur Sahi, who was the eldest son of Raja Krishan Partap Bahadur Sahi, and Musammat Ram Kamal Kuari, mother of plaintiff No. 1.

This suit is one for the partition of a large number of villages, situate in the districts of Gorakhpur, Gaya and Basti, known as the Tamkohi Raj. The plaintiffs claim to be entitled to a share in the estate along with the defendant Indarjit Partap Bahadur by right of inheritance according to the ordinary rules of Hindu Law. They also put forward alternative claims to portions of the property described in the schedules to the plaint. As regards the properties mentioned in schedules B1, B2, and B3, they allege that Kharag Bahadur Sahi, grandfather of plaintiff No. 1, was absolute owner of these properties, and that he shortly before his death gave a moiety of them to his wife Musammat Tileshwari Kuari; that subsequently Musammat Tileshwari Kuari acquired by purchase the properties which are mentioned in schedule C, and that she was entitled to the properties mentioned in schedule D under a gift from her father at the time of her marriage; also that Krishan Partap Bahadur Sahi, the father of plaintiff No. 1, acquired the properties set forth in schedule E and owned the same independently of the Raja and free from any family custom governing the devolution of the Raj. To a share in all these properties

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHI  
v.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHI

v.

INDARJIT  
PARTAP  
BAHADUR  
SAHI.

the plaintiffs lay claim as being properties of Krishan Partap Bahadur Sahi, which descended upon his death to the members of his family according to the ordinary rules of Hindu Law.

The defence of the principal defendant, Indarjit Partap Bahadur Sahi, whose estate is under the management of the Court of Wards, he being a minor, is that all the property in dispute forms part of the Tamkohi Raj and that this Raj is an impartible Raj, devolving on the death of a Raja in accordance with a well-established family custom upon the eldest son, the younger son or sons, as the case may be, obtaining maintenance in recognition of his or their rights as a Babu or Babus, and that as the only son of the late Raja Satrujit Partap Bahadur Sahi, he is entitled to the Raj and the plaintiffs are only entitled to Babuana, or maintenance. He also relies upon an agreement, dated the 20th day of July 1895, which was entered into between his father and plaintiff No. 1, shortly after the death of their father Raja Krishan Partap, as a bar to the plaintiffs' claim. In this agreement the custom of the family is declared, namely, that after the death of the Raja occupying the gaddi his eldest son becomes the owner and possessor of the entire property appertaining to the Raj-riasat, and the other sons live with the eldest son and are maintained by him; but that if they wish to become separate from the Raja, they get their rights as Babus out of the property. Then it is stated that after the death of Raja Krishan Partap Bahadur Sahi, Satrujit Partap Bahadur Sahi became the occupant of the gaddi of the Raj-riasat of Tamkohi according to the practice of the family and the owner of the whole property. Then follows the agreement of the parties that Sarabjit Partap should live according to old custom with his brother and be maintained by him, but that if at any time he wished to separate from his brother a one-eighth share of the entire property belonging to the Raj-riasat should be given to him. It was also agreed that if Raja Satrujit should have no male issue, or if, there being male issue, they should thereafter fail, then Sarabjit and his male descendants should become the owners and occupy the gaddi of the Raj-riasat. In the plaint this agreement is mentioned, but there is no prayer to have it set aside or cancelled. It is alleged, as is the case, that plaintiff

No. 2 was no party to the same, he having been less than a month old at the date of its execution. The plea is advanced that this agreement is not binding on plaintiff No. 1, the allegations being that it was without any consideration; that the consent of plaintiff No. 1 to it was obtained by undue influence and misrepresentation and that it was executed under a mistaken notion that there was a family custom according to which the properties form an impartible raj. The defendant, Musammat Ram Kamal Kuari, who is the mother of the plaintiff Sarabjit, also filed a written statement, and in it she supports the claim of the plaintiffs. She also lays claim to some of the villages in dispute and also to a share in some other villages under a will alleged to have been made by Raja Kharag Bahadur, the father of Raja Krishan Partap Bahadur, in favour of his wife Musammat Tileshwari Kuari, and a subsequent gift by Musammat Tileshwari Kuari to her.

The Court below held that there was no foundation for the claim of this last mentioned defendant, and disallowed it, and she has not appealed from the decree. It also held that the property in dispute formed an impartible Raj and that the agreement of the 20th of July 1905 was binding upon plaintiff No. 1, but was not binding upon his son, he being no party to it. As regards the alternative claim of the plaintiffs, the Court below held that all the property mentioned in the schedules to the plaint formed part of the Raj and descended accordingly in accordance with the family custom set up by the principal defendant.

It will be convenient here to give the family pedigree beginning with Raja Fateh Sahi. It is not necessary for the purposes of this suit to trace it further back. The parties to this suit are the great-great-grandsons of Ram Bahadur Sahi, who was the youngest of the four sons of Raja Fateh Sahi.

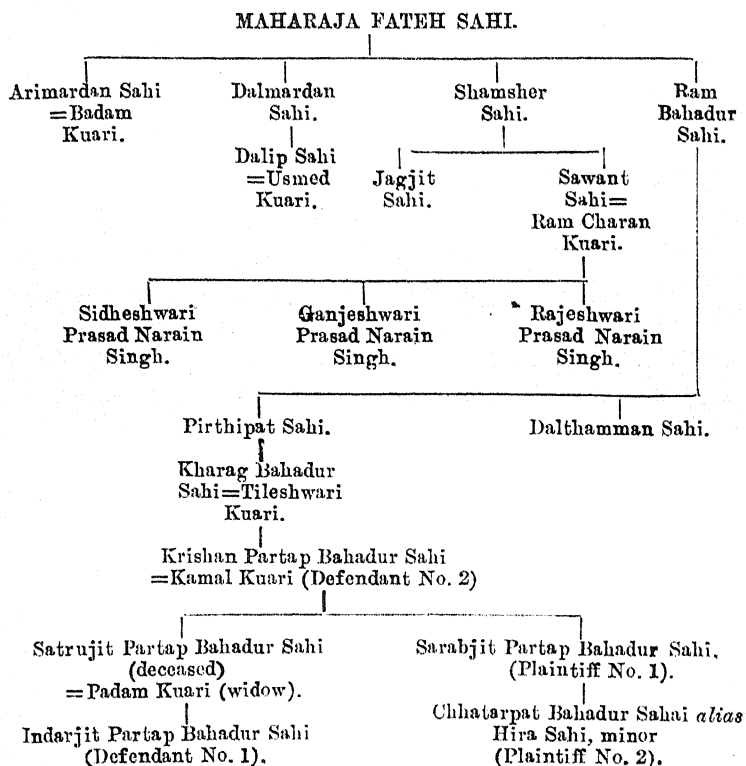
1904

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SARABJIT  
PARTAP  
BAHADUR  
SAHIv.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHI  
v.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.



We shall first deal with the question of impartibility. The Tamkohi estate belonged to Raja Fateh Sahi and is situate in territory which formerly belonged to the Nawab Wazir of Oudh, but was ceded to the British Government in the year 1801. Whether the entire of this estate was acquired by Fateh Sahi or part only was acquired and part inherited by him from his ancestors is a matter in controversy in this appeal. It lies on the west side of the river Gandak. On the opposite bank of this river lies the Raj formerly known as the Hansapur Raj, now the Hatwa Raj, in the district of Saran, which belonged to Raja Fateh Sahi and to his ancestors before him for many generations. This territory formerly belonged to the kings of Delhi. After the battle of Buxar, in the year 1764, when this territory fell into the hands of the East India Company, Raja Fateh Sahi refused to acknowledge allegiance to the British, and in consequence was obliged to leave his estates in that

territory. He crossed the Gandak and settled on property situate on the west bank of the river, which was formerly described as Bank Jogni. The Hansapur estate in the district of Saran is admittedly an impartible Raj. Owing to the hostility of Raja Fateh Sahi it was confiscated by the British Government and let out to farmers until the year 1790, when the Government conferred it upon Raja Chattardhari Sahi, at that time the eldest surviving member of a younger branch of the family of Raja Fateh Sahi.

The sons of Fateh Sahi made several ineffectual appeals to the British Government for reinstatement in this part of their ancestral property. At a later date litigation ensued between two of the grandsons of Raja Chattardhari Sahi on the one side and a great-grandson on the other. The grandsons claimed to be entitled by inheritance in accordance with the ordinary rules of Hindu Law to a moiety of the entire property left by their grandfather. The great-grandson disputed their right to any share, alleging that the Raj had come to him as a member of the eldest branch of the family in accordance with the well-established custom of the family. The litigation closely resembles that in the present case. It was held by the appellate court confirming the decision of the Court below that the Hansapur property was a Raj and that by the rule of the family it descended entire to a single heir; that the Government by setting aside a particular branch of the family did not in intent or in fact confiscate the property and thereby extinguish the rights of every member of the family; that the family custom and the custom of the Raj were not destroyed by the infringement of the custom by virtue of which Raja Chattardhari Sahi acquired the estate (see Special Number Weekly Reporter, 97). This decision was upheld upon appeal by their Lordships of the Privy Council (12 Moore's Indian Appeals, 1). This litigation established the fact that the Hansapur estate was an impartible Raj, and this indeed is not denied. The case for the plaintiffs appellants is not that Raja Fateh Sahi did not formerly possess an impartible Raj in the district of Saran, but that the property which he inherited or acquired on the west bank of the river Gandak, and which belonged at the time of

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHIv.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.



1904

SARABJIT  
PARTAP  
BAHADUR  
SAHIv.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

acquisition to the Nawab Wazir of Oudh, formed no part of that Raj and was not impressed with the character of impartiality. It is said it was his self acquisition, with which he could deal as he pleased. The litigation to which we have referred, it is to be observed, had no concern with any property situate out of the district of Saran, but only to the property in Saran which had been confiscated by the British Government. The Gorakhpur district was at this time in the territory of the Nawab Wazir. For this reason, no doubt, we do not find in the reports of the above mentioned suit any special reference to the possessions of Raja Fateh Sahi out of the district of Saran. We notice, however, that in the judgment of their Lordships a reference is made to the estate of Raja Fateh Sahi situate in the dominions of the Nawab Wazir.

The information given as to this family in the historical records of the district is meagre. Few matters are stated in them, and some of these, as we shall presently show, are inaccurate. In the Settlement Report of the Gorakhpur district of 1871 we find the following passage at page 131:—"Talooka Bank Jogni belongs to the Raj of Tumookoe (Tumkohi). The original founder, a relative of the Hatwa Raja, is said to have crossed the river Gundak from the adjoining district of Saran and established himself in two villages, Bank and Jogunee, which he purchased from the former proprietors. In those days, when a state of warfare and internal strife was the normal condition of this pargana, the natural consequence of a powerful Raja obtaining such a footing in it was the gradual formation, partly by violent usurpation and partly by voluntary transfers of weak and powerless zamindars, of a large taluka, which in time came to include all the villages in the vicinity which the talukdar considered worth possessing. This taluka has the reputation of always having been well managed. The late Raja Khurak Bahadoor (Kharag Bahadur Sahi), whose systematic good management was a model to other talukdars in this district, died about a year before the present revision of settlement and the present Raja was then a minor. It is gratifying, however, to be able to record that since the death of Khurak Bahadoor the estate has been equally well managed without the intervention of the Court of

Wards by Rani Talessur Kuari, the mother of the minor Raja." In his Statistical Account of Bengal, Vol. XI, p. 369, Sir W. W. Hunter writes in regard to the Hatwa family as follows:—"When the East India Company obtained the financial administration of Behar in 1765, Fatti Sahai, then Raja of Hatwa, refused to pay revenue to the Company. On being pressed by the English troops, he retired to a large tract of forest between Gorakhpur and Saran, whence he frequently invaded the British territory. His inroads constantly interrupted the collections of revenue in 1772, and he is supposed to have killed one Gobind Ram, who then rented the property of Husepur. The Collector finding that the revenue of the Hatwa estate could not be collected recommended that the Raja should be pardoned on the promise of his receiving an allowance from Government. This proposal was sanctioned. The Raja came to Patna and promised that he would remain quietly with his family at Husepur. This promise, however, he soon broke; and up to 1775 committed constant depredations on the Company's territories." In the Historical Account of the North-Western Provinces, edited by Mr. Atkinson in 1881, at p. 450, Vol. VI, we find the following account of this district:—"The terrible state of insecurity in the Sidhua Jogna pargana gave the opportunity for the rise of the two principal talukas which still comprise between them the greater portion of the pargana. The first of these was Bank Jogni taluka or Tamkohi Raj, which was founded by Fateh Sahi Bhuinhar, Raja of Hoshyarpur (Hansapur) in Saran. He claimed descent from Mayyura, founder of the Majhauri Raj by a Bhuinhar wife; and his descendants are still recognised as connections by the Majhauri family. Refusing to acknowledge British authority, he was, after the battle of Buxar, expelled from Saran and settled on an estate he had bought a few years before in *tappas* Bank and Jogni. He brought with him a large amount of treasure and received also the support of the Majhauri Raja, who was wise enough to see the advantage of retaining a friendly power as a rampart between himself and the Banjharas. By usurpation, or more commonly by voluntary transfers from weaker zamindars, he extended his possessions swiftly and widely over the south-east of Sidhua Jogna, and

1904

SARABJIT  
PAETAP  
BAHADUR  
SAHI  
v.  
INDARJIT  
PAETAP  
BAHADUR  
SAHI,

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHI  
v.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

before his death was recognised as talukdar of nearly a hundred villages." These extracts are relied upon by the appellants as showing that the possessions of Raja Fateh Sahi in the district of Gorakhpur were acquired by him after his accession to the Raj of Hansapur, and that no part of the Tamkahi estate came to him by descent, and the contention is that the property so acquired by the owner of an impartible Raj and dealt with by such owner in the manner in which Raja Fateh Sahi dealt with the Tamkahi estate cannot be regarded as impartible or subject to the family custom which governs the devolution of the Raj. The Hansapur Raj, it will be observed, is situate in territory which belonged to the king of Delhi, whilst the Tamkahi estate is in territory which was ceded to the British by the Nawab Wazir of Oudh, but we do not think that anything turns on this.

The argument advanced by the appellants is that Raja Fateh Sahi was Raja of the Hansapur estate alone, and that when he was expelled from this Raj he was a Raja without any Raj; that the property acquired by him in Gorakhpur was a recent acquisition to which the family custom could not be said to attach; and that the respondent cannot pray in aid of the alleged impartibility of that property a custom which was incident to the Hansapur Raj. It was further contended on behalf of the appellants that if the custom did ever exist as an incident to the property, it was discontinued. On behalf of the respondent it is contended that the Hansapur estate extended into the district of Gorakhpur and embraced a considerable territory in that district long before the time of Raja Fateh Sahi, and that it is an error to suppose that all the Tamkahi estate was the self acquisition of Raja Fateh Sahi. Now that the respondent is a Raja is not and cannot be disputed. He is officially recognised by Government as an hereditary Raja and is known as the Raja of Tamkahi. The question is, is he a Raja without a Raj? We shall first then consider whether the Hansapur Raj extended into and embraced property in Gorakhpur, and also whether the custom of impartibility, which was incident to the Hansapur Raj, also became or was incident to the Tamkahi estate and was an invariable and continuous custom, bearing in mind that "it is of the essence of family

usages that they should be certain, invariable and continuous," and that "well established discontinuance must be held to destroy them." *Raj Kishen Singh v. Ramjoy Surma Mozondar* (1).

The information given in the historical records, to which we have referred, in regard to the Hansapur Raj, shows no trace of deep research or investigation, and it is doubtful if any great value can be attached to it. One might be led by it to suppose that no property in Gorakhpur was possessed by the Rajas of Hansapur before the time of Raja Fateh Sahi, and that it was only upon his expulsion from Saran that Fateh Sahi acquired property in Gorakhpur. On examination of the evidence before us, however, this does not appear to be the case, for there is documentary as well as oral evidence which leaves no doubt on our minds that Raja Fateh Sahi and his ancestors owned property in Gorakhpur long before his expulsion from Saran, and that these properties were of considerable extent and value. As evidence of this we may first refer to a letter, dated the 6th February 1777 (No. 1734 of the record) which was addressed by the Provincial Council of Patna to the Governor General (Mr. Warren Hastings) and Council, on the subject of these estates. In this letter it is stated that "Futty Saw (*i.e.*, Fateh Sahi) holds the zamindari of Bank Jogni in Sirkar Gorakhpur adjoining to the district of Hussajpur, and from the collusion which has always prevailed between him and the different *Ammils* of the Nabobs in that country, we have reason to believe that the Nabob himself is defrauded of his just revenue at the same time that Futty Saw secures to himself a retreat and keeps the whole district Hussypur in a continual alarm. The zamindari of Bank Jogni and Hussypur were some years ago held under the same Collector and the Nabob's officers received their revenue from the *Ammil* of Hussypur till the former found it more to their own private advantage to separate them. We therefore think this expedient should be again adopted, it would be more likely than any other to effect the purpose of securing the person of Futty Saw by destroying his influence in the only place where he now finds protection. The

(1) (1872) I. L. R., 1 Cal., 186.

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHI

v.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHI  
v.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

present farmer of Hussypur, we understand, would readily engage and give security for the regular payment of the rents of that part of Fatty Saw's zamindari in the Nabob's dominions on a fair reasonable adjustment, taken either from a medium of the last four or five years or from a new equitable valuation." The meaning of this is that Raja Fateh Sahi should be turned out of his Gorakhpur territories and that those territories should be handed over to the farmer of the Hansapur estate. It is later on stated in this letter that the usual (*i.e.*, annual) valuation of Bank Jogni was at that time Rs. 25,000. Now an estate of the annual value of Rs. 25,000 in 1777 must have been one of considerable extent, for it is common knowledge that in those days lands were assessed at a low value and that since, under British rule, property has enormously increased in value. It is not possible to regard property of such annual value as being insignificant. It afforded Raja Fateh Sahi the means, when he was driven out of Saran, with the aid of his retainers and followers of committing depredations and raids in British territory, and in fact of waging war, no doubt on a small scale, upon the servants of the East India Company. The estate of Fateh Sahi is described in this letter as being *part of his zamindari*, it is not treated as being separate and distinct from the Hansapur Raj, and both estates were, it is to be noticed, held for some years under the same Collector. This letter, which deals with the condition of things so long ago, coming as it does from an authoritative source, furnishes valuable evidence. After the expulsion of Raja Fateh Sahi several petitions were presented to Government by his sons with a view to the recovery of the Hansapur estate, and in these the property in the district of Saran, as also talukas Bank Jogni and Bishanpura, are described as the "ancestral property of Fateh Sahi and his sons." The first of these is a petition presented by all the four sons to the Governor General in Council on the 9th of April 1808, through the Secretary to Government in the Judicial Department (No. 148 of the record). In that petition referring to the settlement which had been made by Government with Chhatardhari Sahi, the petitioners state as follows:—"It has ever been the custom in



our family that while the sons of the Raja are in existence the sons of the Babu (or younger brother) cannot have any title to the zamindari. Chattardhari Sahi is the son of the Babu, and we are the sons of the Raja. To us, as such, has a lease of pargana Jogni Bank in Gorakhpur, which also is our hereditary zamindari, been granted by the Collector of that zila, etc." The petition is signed by Arimardan Sahi as Raja and by his brother as Babu. Another petition is that of Raja Arimardan Sahi, dated the 24th of September 1816 (No. 147 of the record) in which the parganas of Kalyanpur, Kawadi, and Sipah and the villages in pargana Pachlaka in the district of Saran, talukas Bank Jogni and Bishanpur, etc., in pargana Sidhua Jobna in the district of Gorakhpur, etc., are described as the ancestral property of Raja Arimardan Sahi under a Royal Farman. In another petition of the same Raja, dated the 21st of May 1821 (No. 146 of the record) the same villages are described as the "ancestral zamindari Raj property of the petitioner who has in his possession the Farmans of the Kings." This petitioner states that his forefathers and the petitioner have continuously been in possession of them "without interruption and participation on the part of anyone else." These petitions indicate that there was ancestral property in the district of Gorakhpur and that this property was regarded by the sons of Raja Fateh Sahi as part and parcel of the Hansapur Raj.

A not unimportant document which was given in evidence on behalf of the defendant respondent without objection in the Court below, but to which at a late stage of the hearing of this appeal, namely in the reply of the learned advocate for the appellants, objection was taken as not having been legally proved, is a copy of a list of villages comprised in taluka Bank Jogni, the zamindari property of Raja Kharag Bahadur Sahi, taken from the settlement volume of 1833. A certified copy of this list was admitted in evidence without objection in the Court below. The objection taken to it before us is that it does not appear by whom the list was prepared and that it is not properly attested. Having regard to the fact that this objection was taken at a time when the respondent could not supplement his evidence, it seemed to us proper to send to the

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHI

v.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

117A  
11777

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHIv.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

Collector's court for the original settlement volume of 1833, and it has been produced before us. From a perusal of it it appears that this list was prepared on the 7th of January 1832 by one Richa Ram, who was at the time the Mukhtar of Rani Rajeswari Kuari, the mother and guardian of Raja Kharag Bahadur Sahi, on the occasion and for the purposes of an enquiry by the Collector into the zamindari of the Raja of Tamkohi in respect of the villages forming taluka Bank Jogni, and that the list was verified by a deposition of Richa Ram, which is filed with it in the settlement volume. Being of opinion that under the circumstances the list and deposition should not be shut out we admitted them in evidence under the provisions of section 568 of the Code of Civil Procedure, and we gave directions that certified copies of them should be prepared by the Court officers and be attached to the record. Raja Kharag Bahadur Sahi, on whose behalf the list was prepared, was the grandfather of the plaintiff Sarabjit. From the list in question, which no doubt gave accurate details, having been made by the agent of Rani Rajeshwari Kuari, the guardian of Raja Kharag Bahadur, it appears that there were no less than 213 villages in Gorakhpur appertaining to the Raj, which were ancestral villages of Raja Fateh Sahi. The names of these villages are all mentioned in it. Other villages are mentioned as having been purchased by Raja Fateh Sahi, as well as villages which were in the possession of Dalmardan Sahi and Ram Bahadur Sahi as Babus. The evidence furnished by this document lends considerable support to the view that the Rajas of Hansapur owned large possessions in the district of Gorakhpur, and that it is not the case that the property in this district was only acquired by Raja Fateh Sahi after his expulsion from Saran. That this estate was of large extent and value is also indicated by a judgment (No. 118 of the record) delivered in a suit which was brought by Shamsher Sahi against Raja Arimardan Sahi in respect of his Babuai ilaka. Appended to the decree is a list of villages mentioned in the Sanad granted by Raja Fateh Sahi to Shamsher Sahi, with the area of the villages. According to this the area of the villages assigned to Shamsher Sahi in respect of his Babuai

ilaka, which was a 2-anna share of the estate, was no less than 21,622 bighas and comprised a number of villages. In 1812 the revenue payable to Government in respect of taluka Bank Jogni was no less a sum than Rs. 24,279. This appears from a judgment of the Special Commissioner, passed under Act III of 1835, on the 29th of June 1836, which was filed by the appellants (No. 1610 of the record). It also appears from a decree of the Sadar Dewany Court at Allahabad, dated the 21st December 1838 (No. 1013 of the record) passed in a suit which was instituted by Rani Rajehwari Kuari against Raja Dalip Sahi, in which Rani Rajehwari Kuari, as guardian of her son Raja Kharag Bahadur Sahi, claimed to be maintained in possession of and for a settlement number with respect to a 2-anna share of the estate of Raja Fateh Sahi, that at that time the revenue of the 2-anna share amounted to Rs. 8,185-7-2. According to this the revenue of the entire taluka of Bank Jogni at this time amounted to upwards of 65,000 rupees. The evidence thus supplied shows beyond any doubt that property forming part of or appurtenant to, the Hansapur Raj was acquired and belonged to the ancestors of Raja Fateh Sahi, and that Raja Fateh Sahi was possessed of a large estate in the district of Gorakhpur before and at the time of his expulsion from Saran.

Some witnesses, who are related to or connected with the Hansapur family, were examined on behalf of the defendant, and in the course of their evidence detailed from family tradition matters which also go to establish that in the time of the ancestors of Fateh Sahi the Raja of Hansapur possessed many villages in Gorakhpur which formed part of the Hansapur Raj, villages situate in Gorakhpur having been given by way of Babuai allowance to cadet branches of the family. This evidence was received in the Court below without objection and only at a late stage of the hearing of this appeal, namely, in the reply of the learned advocate of the appellants, was any objection as to its admissibility raised. Mr. Chaudhri, on behalf of the appellants, contended that the statements of these witnesses were not admissible in evidence, being made merely from hearsay. Now, under section 49 of the Evidence Act,

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHIv.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHI  
v.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

when the Court has to form an opinion as to the usages of a family, the opinion of persons having special means of knowledge thereon are relevant facts. So far as the evidence objected to can be held to fall within this section, it is no doubt admissible. Commenting upon evidence of this description in the case of *Garuradhwaja Prasad v. Superundhwaja Prasad* (1) their Lordships of the Privy Council say, at pages 51 and 52:—"By section 49 when the Court has to form an opinion on (*inter alia*) usages of any family, the opinions of persons having special means of knowledge thereon are also relevant. But by section 60 if oral evidence refers to an opinion or the grounds on which that opinion is held it must be the evidence of the person who holds that opinion on those grounds. Their Lordships think it is admissible evidence for a living witness to state his opinion on the existence of a family custom and to state as the grounds of that opinion information derived from deceased persons, and the weight of the evidence would depend on the position and character of the witness and of the persons on whose statements he has formed his opinion." Bearing in mind this rule, we shall deal with the evidence of these witnesses. Their evidence is directed to establish the case of the respondent and to prove that the Tamkohi estate is an impartible Raj and has been held by a long succession of Rajas from a period long anterior to the expulsion of Fateh Sahi from Saran. If it be a fact that villages in Gorakhpur were given by the predecessors in title of Fateh Sahi to cadets of the family by way of Babuai allowances, this would go some way to prove that the family custom governed the Tamkohi as well as the Hansapur estate. Two Rajas are mentioned in the course of this evidence, namely, Raja Rudra Sahi and Raja Sardar Sahi, the latter of whom was the father and immediate predecessor in title of Raja Fateh Sahi, while Raja Fateh Sahi was the eighth Raja in succession to Raja Rudra Sahi. Babu Mahesh Prasad Sahi, an old gentleman of 70 years, is one of the witnesses to whom we refer. He is related to the Hatwa family (*i.e.*, the Hansapur family), being a descendant of Sumer Singh, one of the four sons of Raja Rudra Sahi. He says that Sumer Sahi lived at Gaura, a village

(1) (1900) I. L. R., 23 All, 37.

which he had obtained along with two other villages in the district of Gorakhpur from Raja Rudra Sahi by way of Babuai allowance. The other villages are Dubni and Katwa, and the witness says they are still in his possession. He mentions other instances in which other villages in Gorakhpur were given to cadet branches of the Hansapur family. These Babus, he says, belong to the branch of Gambhir Sahi, who was the son of Raja Rudra Sahi and brother of Sumer Sahi, and were settled in the villages of Tirman Sahu, Badraon, Pakha and Banbira in the Gorakhpur district. He then described how a Raja lived and ruled at Tamkahi and observed all the ceremonials which are usual in the case of a Raj. His knowledge as regards the grants made by way of Babuai allowance was altogether derived from family reputation. He says that he heard of the grants from his grandfather Ardhwan Sahi and from his uncle Narain Sahi; the former lived at mauza Tirman Sahu, while the latter lived at mauza Pakha. The evidence of this witness is clear, definite and precise. In no respect was he shaken in cross-examination, and we have no reason to doubt that his statement faithfully records what he had learnt from the members of his family of an older generation. According to his evidence, so far back as the time of Raja Rudra Sahi, five generations or so before the time of Raja Fateh Sahi, villages in Gorakhpur were given to the younger members of the family by way of Babuai allowance. Another witness who gives evidence to the same effect is Babu Ram Prasad Sahi, an old zamindar of the age of 76 years, residing at Suria in the district of Gorakhpur, also related to the Tamkahi family. He says that the village of Suria in the Gorakhpur district was given by Raja Sardar Sahi, the father of Raja Fateh Sahi, to his great grandfather Baijnath Sahi on the occasion of the marriage of the latter to the daughter of Raja Sardar Sahi. This witness was subjected to a long cross-examination, but was in no respect shaken in his evidence. In answer to a question put to him by the pleader for the defendant No. 1 he mentioned another instance in which a village in the district of Gorakhpur was given by Raja Sardar Sahi as dower on the marriage of a daughter. He says that mauza Katia was given as dowry to Talihar Sahi, ancestor

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHI  
v.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.



1904

SARABJIT  
PARTAP  
BAHADUR  
SAHI  
v.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

of Babu Billar Sahi, at the marriage of the daughter of Sardar Sahi, and that this village is still in the possession of the family of Talihar Sahi. He gives further evidence in regard to the Tamkahi family and in proof of the carrying out of the ceremonies of tilak and gaddi-nashini on the succession to the estate of a Raja. Babu Narain Sahi, the next witness who gives evidence upon this point, is a descendant of Gambhir Sahi, the son of Raja Rudra Sahi. He says that mauza Pakha, also in the district of Gorakhpur, has been in his family from the time of Raja Rudra Sahi, Raja of Hursypur and Bank Jogni, and that Rudra Sahi gave this village to Gambhir Sahi as Babuai allowance. He says Raja Rudra Sahi had four sons named Hamir Sahi, Tirbhawan Sahi, Gambhir Sahi and Sumer Sahi; Gambhir Sahi had four sons, from one of whom, Harnath Sahi, he (the witness) was descended; that the descendants of one of the sons of Gambhir Sahi settled in mauza Tirman Sahu, another in Pakha, a third in Pharenda and the fourth in Banbira, all in the Gorakhpur district, and all these villages had been in the family of Gambhir Sahi's descendants from the time of Gambhir Sahi; his own ancestor Harnath Sahi received six villages, also in the Gorakhpur district, all of which are still held by him. In answer to a question in cross-examination, he mentioned the names of the six villages which had been given by way of Babuai allowance, namely, Pakha, Ramnagar, Korbiswa Buzurg, Malehwa, Bhanpur and Lohraulua. All these villages are in the Gorakhpur district. This witness is a man of means and position. He says that the income from the villages owned by himself and the descendants of his two brothers amounts to Rs. 20,000 annually; and that in addition to this a money-lending business is carried on, the profits of which amount to Rs. 2,800 annually. He further stated that he himself had purchased zamindari property worth Rs. 1,42,000. Nothing was elicited in cross-examination which throws any doubt upon his reliability and veracity, and we have not the slightest hesitation in accepting his evidence as altogether reliable. It and the evidence of the two other witnesses to whom we have referred cannot, we think, be wholly rejected as inadmissible. It in substance represents the opinions of persons having special

means of knowledge based on information derived from deceased members of the family, and cannot be treated as of no value. It goes to show that the Rajas of Hansapur, prior to the time of Raja Fateh Sahi, owned a considerable extent of property in the district of Gorakhpur, and that that property was treated as forming part of the Hansapur Raj and as such subject to the custom as to devolution prevailing in the family.

The plaintiffs appellants rely on the evidence afforded by the historical records to which we have referred and also upon the evidence of a number of witnesses as showing that the possessions of Fateh Sahi in Gorakhpur were acquired after his expulsion from Saran. The records are sketchy, and, as the evidence to which we have referred, we think, shows, are inaccurate. In view of the documentary evidence which the respondent has adduced, they cannot be accepted as by any means establishing the case that Fateh Sahi or his ancestors had no property in Gorakhpur prior to the date of the battle of Buxar. No doubt after the retreat of Fateh Sahi from Saran he added to his possessions in Gorakhpur, but that he had large possessions there previously is to our minds proved beyond any doubt. Three witnesses, namely, Gokul Narain Sahi, Piare Narain Sahi and Jagdesh Narain Sahi, were examined on behalf of the plaintiffs appellants to prove that their ancestors held portions of Bank Jogni, but were driven out therefrom by force by Fateh Sahi after his retreat from Saran. The first named says the zamindars of Bank Jogni were his ancestors and that Fateh Sahi forcibly took the zamindari from his ancestor Bhikam Sahi when he was turned out of Hansapur. This, he says, he heard from his father. He also said that he made the statement because he had got papers in connection with the zamindari. What these papers are, or contain, has not transpired, for they have not been produced. Piare Narain Sahi gives evidence to the same effect, as does also Jagdesh Narain Sahi. How this evidence came to be admitted it is difficult to see. The witnesses admit that no attempt was ever made by petition to Government or otherwise to recover the property so alleged to have been forcibly taken. We think that the learned Subordinate Judge properly attached no credit or weight to their evidence. It savours of tutoring,

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHI  
v.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHI  
v.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

and is worthless. The plaintiffs appellants also rely on the evidence of the defendant Rani Ram Kamal Kuari, the widow of Raja Krishan Partap and mother of the plaintiff Sarabjit, as showing the tradition of the family in regard to the acquisition of this property. In the course of her evidence, which was taken by commission, she stated "this estate has been in existence from the time of Raja Fateh Sahi. It was founded by Raja Fateh Sahi. Fateh Sahi acquired it by the force of his arms. This lady throughout her evidence betrayed a strong bias in favour of the plaintiffs appellants and is not in our opinion reliable. In no case, however, could weight be attached to her vague and general statement. After careful consideration of all the evidence furnished on this head we have come to the conclusion that Raja Fateh Sahi and his ancestors owned property of considerable extent and value in the district of Gorakhpur, and that it is a mistake to suppose that only after the expulsion of Raja Fateh Sahi was property acquired in Gorakhpur.

Now let us see how Raja Fateh Sahi dealt with his properties. It appears that he gave up his property in Gorakhpur in or about the year 1799 to his sons and became a faqir. He had offered a determined resistance to the British, but was ultimately forced to retire across the Gandak. From that retreat he made incursions into the adjoining territory which had fallen into the hands of the British, and is said to have been responsible for the death of at least one of the farmers to whom the Hansapur Raj was handed over by Government. Conscious, no doubt, of the hopelessness of attempting to recover his estate and in despair of retrieving his fortunes he became a faqir. Before taking this step, however, he granted three sanads to his three younger sons of shares in his property. To his second son, Dalmardan Sahi, he gave a  $3\frac{1}{4}$ -anna share, and to each of the younger sons a 2-anna share; thus leaving for his eldest son, Arimardan Sahi, who became the Raja, an  $8\frac{1}{4}$ -anna share. The disposition made by him is relied upon by both sides; by the appellants as showing that he did not regard the estate as being impartible, but divided it among his sons; and by the respondent as, on the contrary, establishing its impartibility and indicating a clear

intention on his part that the property should be treated as an impartible Raj. The sanads are not forthcoming, and this is unfortunate, as they undoubtedly would have thrown some light upon the situation at the time when they were granted. It appears that upon the death of the defendant's father, Raja Satrujit Partap Bahadur Sahi, on the 10th of October 1898, the then manager of the estate, a Mr. Dallas Campbell, improperly gave over all papers which were in the custody of Raja Satrujit to the appellant Sarabjit. From his own evidence Mr. Campbell appears to have acted very disloyally in this matter towards the defendant. He became aware, he says, soon after the death of Raja Satrujit that his brother Sarabjit had designs upon the estate and was endeavouring to avoid the effect of the iqarnama which he had executed. He actually accompanied Sarabjit to Calcutta to take legal advice in the matter and lent him a thousand rupees in Calcutta and paid his own travelling expenses out of the Raja's estate. He says that Sarabjit told him before going down to Calcutta that he was going to claim an 8-anna share in the estate. It is evident from this that he played into the hands of Sarabjit. The result of his conduct in handing over the papers belonging to the Raj is that the defendant has lost the control and custody of undoubtedly valuable documents, and, amongst others, the originals, or at least copies, of the sanads which were granted by Fateh Sahi to his three younger sons. That Sarabjit obtained the originals or copies of these sanads there can be no doubt, but he has suppressed them. On the 5th of October 1899 he and his co-plaintiff appellant filed, under section 59 of the Code of Civil Procedure, a list of the documents which they considered necessary to produce in support of their claim. Amongst these documents is the following item:—"No. 55 sanads relating to partition, written by Fateh Sahi in favour of his sons." The defendant called for an inspection of these and other documents under section 131 of the Code of Civil Procedure, the sanads being numbered 42 in the list accompanying the notice. At this time we may conjecture that the plaintiffs had realized that the sanads were not favourable to their case, for we find that they refused to give inspection of them. Their reply to the application for inspection

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHI  
v.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHI  
v.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

was "paper No. 42 referred to in your notice is not still in my possession. It also can be traced from the case book of the suit between Babu Bir Partap Sahi and Maharaj Rajendro Partap Sahi." This reply that the sanads were not then in his possession shows that he had at one time or other possession of them. He has not accounted for their loss. The only excuse made for the non-production of these documents is a very lame one, and is a mere conjecture of his learned counsel. It is that Sarabjit may not have had the sanads when the list of documents was filed and that the insertion of them in the list may have been due to the "bungling" of a clerk. This we cannot accept. In our opinion the sanads have been deliberately suppressed by the plaintiffs, as has also a copy of a judgment of the Sadar Court, in the case of *Dalmardan Sahi v. Pirthipat Sahi*, which is mentioned in the plaintiff's list of documents, and which also would have thrown light upon the case. The original judgment is not forthcoming, having no doubt been destroyed in the Mutiny, and the defendant respondent has been unable to procure a copy of it. It is fortunate that there is some evidence forthcoming as to the nature of the arrangement which was made by Fateh Sahi when he determined to give up his property to his sons and became a faqir. It is to be found in a petition which was filed by one Jhumak Lal on behalf of one of Raja Fateh Sahi's sons, Shamsheer Sahi, on the 17th of February 1812. The petition was for separation of the share of Shamsheer Sahi, which was allotted to him by his father, Raja Fateh Sahi, from the share of his brother, Raja Arimardan Sahi. In it it is stated that Raja Fateh Sahi "having regard to the old age, and with a view to avoid future disputes" sent for his four sons in 1206 Fas-li (corresponding to the year 1793-1799) and gave to his eldest son a share of his entire property and to his other sons also shares "by way of *Babuai right*." It further states that Raja Fateh Sahi gave to his younger sons deeds of partition and told them to enquire of their brother, Raja Arimardan Sahi, if he accepted the partition made by him, and that the three brothers went to Raja Arimardan Sahi and that he agreed to the partition according to the old custom of the family. It further



contains a statement as follows:—"Now, the said defendant (*i.e.* Raja Arimardan Sahi) having been in-talled in the gaddi of the Raja, the Government revenue suffers for want of care on his part, and on account of the arrears of the Government revenue the entire taluka is advertised for sale every year. Under such circumstances there is a great apprehension that, God forbid, the entire taluka may be sold by auction for arrears; and by reason of the property being joint the plaintiff's share may also be sold by auction." The prayer of the claim is "that the plaintiff's name may be entered in the public settlement records in the place of the defendant in respect of certain villages and the defendant's name expunged therefrom, so that the plaintiff might be enabled to pay the Government revenue and preserve the property." A similar petition was filed on behalf of another son, Dalmardan Sahi, on the 5th of March 1812. In accordance with the prayers contained in these two petitions certain villages were allotted to these two brothers, and the appellants rely upon this dealing with the property as strongly supporting their case that the estate was not impartible and was never treated as such.

It appears to us to be clear from the judgment of the Court in the matter of the petition of Shamsheer Sahi that the Court did not regard the application as one for the partition of the Raj as of right under Hindu Law, but merely as a claim for the separation in the settlement records and for possession of the Babuai ilaka to which the petitioner was entitled. In the judgment of the Court, dated the 4th of January 1813 (No. 118 of the record), we find a passage which clearly shows what was in the mind of the District Judge who decided the case. It runs as follows—"Another objection of the defendant that the Raj could not, under the Hindu Law, be partitioned is altogether irrelevant, because the Hindu Law is consulted in a case in which the plaintiff claims a share by the partition of the Raj. In this suit the plaintiff's claim is merely for the separation of settlement and possession of his Babuai ilaka, all the Babus get Babuai villages from the Raja," and later on we find the following passage:—"Under such circumstances the District Judge deems proper that the settlement number of the

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHI  
v.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHIv.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

villages mentioned in the sanad filed by the plaintiff, of which he is in possession and enjoyment, be separated and entered in his name and the separation of the plaintiff's ilaka from that of the defendant is not calculated to cause any loss to him (*i.e.* the defendant)." These petitions show, we think, that Raja Fateh Sahi regarded his Gorakhpur property as being a Raj and subject to the custom of impartibility which prevailed in his family. Whilst he purported to give to his eldest son an  $8\frac{1}{4}$ -anna share, he gave to his younger sons smaller shares, and that by way of Babuai allowance only; moreover, he required the younger sons to obtain the assent of his eldest son to this arrangement. We also gather from these petitions that the petitioners, Babus Shamsher Sahi and Dalmardan Sahi, admitted that their eldest brother was the Raja and had been installed on the gaddi and that the separation of the shares to which they were respectively entitled for maintenance was carried out with the sole object of enabling the petitioners to pay the Government revenue directly to Government and so relieving them from the apprehension of the sale of the property for arrears of revenue. This goes but a short way in establishing the partibility of the estate, if it helps the plaintiffs at all in their contention that the estate is partible. The Courts may have given more to Shamsher than he was strictly entitled to; but, be this as it may, the claim was advanced by Shamsher Sahi under the sanad granted by his father and on the basis of that sanad, and the sanad clearly indicated that the share of the estate was given to him by way of Babuai allowance. Mr. Mayne in his Treatise on Hindu Law says of these maintenance grants as follows:—"The obligation imposed upon the head of a family to maintain its members is generally discharged either by defraying out of the common fund the expenses of those who live in the family house or by allotting to them sums of money payable periodically; sometimes, however, portions of land of separate villages are assigned to particular members to be held by them for their own support" (6th edition, page 508). He cites as an authority for this the case of *Runjeet Singh v. Koer Gujraj Singh* (1). He then proceeds:—"Prima facie land so granted is

(1) (1873) 1 I. A., 9.

resumable at the death of the grantee. Sometimes by special usage such grants are resumable at the pleasure of the grantor. Sometimes they are resumable on the death of the grantor by his successor. Where the head of the family is the owner of an impartible estate, it is not uncommon to find an alienation of villages made for the maintenance of a junior member and his direct male line, and in such a case it does not revert to the principal estate until that line becomes extinct. A further possibility is that the grant may have been absolute and irrevocable in full satisfaction of all claims to future maintenance. Such a grant if properly made out vests in the grantee not only a heritable but an alienable estate, and undisturbed possession for successive generations may justify a presumption that the grant was of such a nature. Sometimes the transaction takes the form of partition between the senior and junior members, which has the same effect." It appears to us that, whatever was the nature of the grants made by Fateh Sahi in favour of his younger sons, these grants were made as maintenance grants, and even if they took the form of absolute and irrevocable grants, no inference can be drawn from them in support of the plaintiffs appellants' contention. Again, we find that a suit, which was instituted by Dalmardan Sahi, the second son of Fateh Sahi, to have an alleged adoption of Pirthipat Sahi by Raja Arimardan Sahi set aside was on the basis that the estate of Raja Fateh Sahi was a Raj. This will be seen from a rubkar dated the 23rd November 1827 (No. 121C of the record). The appellate judgment in this suit, upholding the claim of Dalmardan Sahi, would no doubt disclose valuable information, but unfortunately cannot be procured. The original was, no doubt, destroyed in the Mutiny. The plaintiffs had, as we have said, a copy of it, but they have failed to produce it. It is disclosed, as we have above pointed out, in the list of documents which was filed by him in this suit. On the defendants applying for inspection, the answer was that the paper which included the copy in question "are simply copies. You also can obtain copies from public offices." Plaintiffs now allege that these papers are not in their possession. It is, as we have pointed out, a matter beyond doubt that they had the documents which

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHIv.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHI

v.

INDARJIT  
PARTAP  
BAHADUR  
SAHI.

are mentioned in this list, and we can come to no other conclusion than that they have been suppressed. Evidence was given on behalf of the plaintiffs appellants to establish that the ceremonies of tilak and gaddi-nashini were not observed in recent years, and reliance was placed upon it as showing that the Rajas of Tamkahi were Rajas in name only and not in reality. Rani Ram Kamal Kuari in the course of her evidence said that the estate was an ordinary zamindari and that she knew this to be so because partition took place and the ceremonies of tilak and gaddi were not performed. She says that she learnt this from her husband's paternal grandmother, Rani Rajeshwari Kuari, and from her mother-in-law, Rani Tileshwari Kuari, and also from her husband and the members of his brotherhood. She further says that upon the death of her husband, Raja Krishan Partap Sahi, Satrujit did not receive the tilak or gaddi, and that after the death of Satrujit his son, the defendant Indarjit, did not receive the tilak or gaddi. Then in cross-examination she assigns as her reason for knowing that the estate is an ordinary zamindari, that partitions are made, and she gives as an illustration that Fateh Sahi had four sons, and that partition was made among them. This witness, as we have said, throughout her evidence shows a strong bias in favour of her son Sarabjit, and we are not disposed to think that any weight can be attached to it. Rani Padam Kuari, the widow of Satrujit, gives evidence which is in direct conflict with it. Neither of these ladies, however, were likely to have much knowledge in regard to the matter, and we do not think that their evidence can be regarded as important. Rani Padam Kuari deposes to a conversation which, if her evidence be true, and we see no reason to doubt its truth, throws discredit upon the evidence of Rani Ram Kamal Kuari. Referring to the dispute which arose after the death of Raja Krishan Partap between her husband Satrujit and his brother Sarabjit in reference to the estate, she says that Sarabjit used to come inside (*i.e.*, into the *zanana*) and hold conversation with his grandmother Rani Tileshwari Kuari and his mother Rani Ram Kamal Kuari in her presence and beg them to reason with Satrujit in regard to the property, begging them to get his name entered

in respect of a moiety of it, and that Rani Tileshwari Kuari and Rani Kamal Kuari told him that they could not reason with Satrujit "inasmuch as it (the estate) was a Raj and was impartible; that he was only entitled to the Babnai right, whatever might be proper for maintenance, and that they should go to Gorakhpur and after consulting some vakil or mukhtar should do whatever they deemed proper."

A number of witnesses were examined in support of the plaintiffs' case, but we cannot say that they throw much light upon the issues for our determination, or to any great extent help the plaintiffs. Of these, Mangal Prasad Sahi, who is distantly related to the Tamkohi family, stated that he knows the Tamkohi estate and that it is "an ordinary zamindari" and that so far as he knows it is partible. Later on he says that in Tamkohi when a proprietor dies "neither tilak nor gaddi is given to another proprietor," and that after the death of Raja Krishan Partap Sahi nobody received the tilak or was installed in the gaddi. In cross-examination he admitted that he considered Raja Satrujit Partap Sahi, the father of the defendant, as the Raja, and used to call him Raja. He also admitted that "Tamkohi is a big estate" and that "in such an estate people gather together and offer nazar when a new man becomes a Raja." He also stated that he attended the Darbar of Raja Satrujit, and that he found the same rule observed in his Darbar as that observed in the Darbar of Raja Krishan Partap, and he says that after the death of Raja Satrujit he regarded his son as the Raja. The next witness is Gaya Prasad Roy, whose evidence is to the same effect. He says that the Tamkohi estate exists from the time of Fateh Sahi and is "an ordinary zamindari and is partible," and that when a proprietor of the estate dies his successor does not receive tilak or gaddi. In cross-examination, however, he admits that he attended the Darbar of Raja Krishan Partap Sahi several times and that he used to look upon Krishan Partap as a Raja, but he says that no one became Raja after the death of Krishan Partap. He would not admit that Raja Krishan Partap used to sit on a gaddi at the Darbar, but would only admit that he sat in a chair. In answer to a question in cross-examination

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHIv.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.



- 1904  
 SARABJIT  
 PARTAP  
 BAHADUR  
 SAHI  
 v.  
 INDARJIT  
 PARTAP  
 BAHADUR  
 SAHI.

he let slip the answer that Fateh Sahi was the Raja of both Tamkohi and Hansapur. He says:—"Fateh Bahadur Sahi had another estate, Hansapur, besides the Tamkohi estate. Fateh Bahadur was the Raja of both Tamkohi and Hansapur. He was expelled from Hansapur and then he came to Tamkohi." We do not think that the plaintiffs' case is assisted by evidence such as this. Kali Prasad Sahi gave evidence to the same effect. In cross-examination this witness also admitted that he attended the Darbar of Raja Krishan Partap on several occasions, but he refused to admit that Raja Krishan Partap Sahi was a Raja. He says:—"I consider Raja Krishan Partap Sahi a nominal Raja and not an installed one." Comment upon evidence of this class is unnecessary. Kali Charan Roy said that Raja Fateh Sahi was "a nominal Raja" (whatever he means by that), and that the Tamkohi estate is an "ordinary zamindari" and is "partible." Asked to explain how he came to know this, his reply was "from my frequent visits." How he came to know from visits to the place that the estate is partible it is difficult to understand. In cross-examination he admitted that Arimardan Sahi was called a Raja, but he goes on to say that "every male member of the Tamkohi family is called a Raja." This last statement is manifestly untrue. Another witness on whose evidence the plaintiffs relied is Ram Lal, a patwari of Pipraghat, a village which belonged to Raja Krishan Partap. He had previously been patwari of Piprabarna. He stated that the Tamkohi estate is a partible one and that he had heard this from his father and grandfather; that no one received tilak or gaddi after the death of Kharagjit (*i.e.*, Raja Kharag Bahadur Sahi) or after the death of Raja Krishan Partap or Raja Satrujit; but he admitted that these persons were called Rajas. He would not admit that Raja Krishan Partap, who was the owner of the estate for 36 years, ever sat on the gaddi, though he admitted that he sat on the masnad. We are not aware of any distinction in the meaning of the words gaddi and masnad. They mean the same thing, one being Hindi and the other Persian. In answer to the question:—"For how many years did Raja Krishan Partap Sahi sit on the gaddi?" He stated:—"I cannot tell about his

sitting on the gaddi, but he was the owner and Raja of the estate for 36 years from 1238—1302 Fasli. I saw Raja Krishan Partap sit on the masnad; Raja Krishan Partap used to hold Darbars. Those who came to his Darbars would sit according to their rank and position." Another witness, Ablakh Rai, who is the owner of a small zamindari, said that the Tamkohi Raj is an ordinary zamindari, and that he derives his knowledge of this because men and women both became the owners of the estate, and it is divided and daughters' sons become its owners. Kishan Dayal Rai, who is also a small zamindar, stated from hearsay that the estate was an ordinary zamindari, his means of knowledge being, as in the case of the last witness, that the rights of daughters' sons are recognised and women become its owners. He also stated that the ceremonies of tilak and gaddi were not observed on the accession of a Raja. Evidence such as this needs no comment. It is not merely worthless as legal evidence, but it is overborne by the oral and documentary evidence to which we have already referred. The witness Ram Prasad, to portions of whose evidence we have already referred, testifies to the performance of the tilak ceremony in the case of Raja Krishan Partap, he himself having been present on the occasion. After the performance of the tilak ceremony, he says Raja Krishan Partap took his seat on the gaddi which was used by his father Raja Kharag Bahadur. He also says that on the 12th day ceremony after the death of Raja Krishan Partap a turban was tied on the head of Satrujit Partap, and his mother and grandmother, *i.e.*, Musammat Ram Kamal Kuari and Musammat Rajeshwari Kuari made tilak on his forehead, and that afterwards Satrujit occupied the gaddi which his father had occupied before him. On that occasion, he says, Sarabjit presented a gold mohur to Satrujit, and other Babus also made him presents, he himself doing likewise. He also says that on the 12th day ceremony after the death of Satrujit the same ceremonies were observed in the case of his son, the defendant. He also states that whenever Satrujit went out (presumably on ceremonial occasions) he was attended by macebearers and trumpeters, and so forth, and that he saw the same display in the time of Raja Krishan Partap, Raja Kharag

1904

---

SARABJIT  
PARTAP  
BAHADUR  
SAHIv.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHIv.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

Bahadur, and Raja Dalip Sahi. The plaintiff Sarabjit himself in his evidence admitted that his father was regarded as a Raja, and recollects that a turban was tied round the head of his brother, and that so far as he recollects it was tied by his grandmother, Rani Tilleshwari Kuari. Although he would not admit that his brother was installed on the gaddi, he did admit that gaddi-nashini was recognised in the family. He says "we have gaddi in our family. I saw my father sit on the gaddi and holding court, and also darbars used to be held in his father's time which were attended by Babus and respectable persons." Mahesh Prasad, who is related to the family, says that on two occasions he was present when Raja Krishna Partap sat on the gaddi and held Darbars. Babu Narain Sahi, who is also related to the family, says that he was present when the tilak and gaddi ceremonies were performed in the case of Raja Krishan Partap. The witnesses Babus Ram Prasad, Mahesh Prasad and Narain Sahi are men of respectability and position, whose veracity has not and could not well be impeached. The plaintiffs' witness, Dallas Campbell, admitted that the gaddi ceremony took place after Satrujit's death, and he says that Satrujit "lived as a Raja and was also treated as such by others." That the ceremonies of tilak and gaddi-nashini were continuously performed in this family from generation to generation, the evidence leaves no doubt. It is highly improbable that in the case of a family owning a title which was and is officially recognised by the Government as hereditary the observances attendant upon the accession of a Raja would be overlooked.

We must not leave this branch of the case without referring to what in the case of the plaintiff Sarabjit at all events appears to us to be strong and cogent evidence. After the death of Raja Krishan Partap the plaintiff Sarabjit set up a claim to a moiety of the Tamkahi estate. His brother Satrujit resisted this claim on the ground that the estate was an impartible Raj and that his younger brother was only entitled out of it to Babuai allowance. Ultimately, after consultation with a number of lawyers, a compromise was come to which was embodied in the agreement to which we have already alluded, of the 20th of

July 1895. At the date of this agreement the plaintiff Chhat-  
arpat was about a month old. In this agreement Satrujit is  
described as the proprietor of the estate of Tamkohi and the  
eldest son of Raja Krishan Partap. The agreement contains  
a statement, declaration and agreement which are introduced by  
the following words:—"We, both the executants, make the fol-  
lowing statement, declaration and agreement, and they will be  
binding upon us, the executants, and our male descendants."  
Then come the following declarations:—" (1) The last Raja  
of the estate named Tamkohi, district Gorakhpur, was Raja  
Krishan Partap Bahadur Sahi, who died on the 31st of Decem-  
ber 1894. We, the two executants, are his sons; and of us  
Raja Satrujit Partap Bahadur Sahi is the elder and Sarabjit  
Sahi is the younger son. (2) According to the Hindu Law and  
the custom of this family, after the death of the Raja occupying  
the gaddi his elder son becomes the owner and possessor of the  
entire property, movable and immovable, appertaining to the Raj  
Riasat, and if there are also other sons of the deceased Raja, all  
of them live with and are maintained by their elder brother, *i.e.*,  
the Raja occupying the gaddi, and when they wish to become  
separate from the Raja for the time being, they get their right as  
Babus out of the whole property, movable and immovable,  
appertaining to the estate existing at the time of separation. (3)  
Accordingly after the death of Raja Krishan Partap Bahadur  
Sahi, I, Satrujit Partap Bahadur Sahi, the elder son, became the  
occupant of the gaddi of the Raj Riasat of Tamkohi, men-  
tioned above according to the Hindu Law and practice and  
custom of the family and am the owner in possession of the  
whole property, movable and immovable, appertaining to the  
Raj Riasat." Then follows a declaration on the part of  
Sarabjit to the effect that he is living and will continue to live  
according to the old custom with his elder brother Raja Satru-  
jit and will be maintained by the Raj Riasat and that Raja  
Satrujit is and will remain the owner in possession of the entire  
property appertaining to the Raj Riasat, but that if at any  
time in the future Babu Sarabjit or after him his male descen-  
dants desire to become separate from Raja Satrujit or his male  
descendants occupying the gaddi of the Raj Riasat then Raja

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHIv.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHI  
v.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

Satrujit or his male descendants occupying the gaddi would give Satrujit or his male descendants a three-eighth share out of the entire property, movable and immovable, appertaining to the Raj Riasat existing at the time of separation. Later on it is explained that at the date of separation Babu Sarabjit or his male descendants should receive a three-eighth share not merely out of the moneys then existing but also out of all moneys which might be saved between the date of the agreement and the date of separation. After other provisions the agreement concludes with the following words:—"Both of us, the executants, have mutually executed this deed of agreement of our own accord and free will, in a sound state of body and mind, and we and our male descendants are and will be bound by it. This Raja Satrujit Partap Bahadur Sahi or his male descendants shall have no right contrary to the conditions and contents of this document, to object in giving to Babu Sarabjit Partap Bahadur Sahi or his male descendants at the time of separation the one-eighth share detailed in paragraph 4 of this document, with the exception of the property mentioned in clause E of that paragraph. In the same way Babu Sarabjit Partap Bahadur Sahi or his male descendants shall have no right at the time of separation to claim more than the property detailed in paragraph 4 of this document, from which the property mentioned in clause E of that paragraph is excluded." We may mention that the property which is excluded from the agreement is an ilaka situate in the district of Muzaffarpur, which was acquired by Raja Satrujit from his father-in-law. Now no document could more clearly express the existence of the family custom upon which the defendant relies, or the fact that the Tamkohi estate was an impartible Raj. In view of this document it is difficult to conceive how the plaintiff Sarabjit came to advance the present claim. He has not in the plaint sought to have this agreement cancelled, but he has set up the case that the execution of it by him was procured by undue influence, misrepresentation and mistake, and that he was induced by his elder brother, in whom he reposed confidence, to sign it. Now we shall assume that the Court can disregard this agreement and give the plaintiff Sarabjit the relief which he



claims, notwithstanding that there is no prayer for the cancellation of it, and shall consider the grounds which he has put forward for asking the Court to treat it as a nullity. His learned counsel have abandoned the case that its execution was procured by undue influence or misrepresentation, and properly so, for there is not a shred of evidence to support such a case. It is, however, contended that the document was executed in the mistaken belief that the Tamkohi estate was an impartible Raj, and so having been executed under a mistake of fact may be disregarded. Let us see the circumstances under which it was executed. After the death of his father Raja Krishan Partap, Sarabjit conceived the notion that he was entitled to one-half of the estate, and this notion was no doubt encouraged by the fact that in the time of his grandfather, Raja Kharag Bahadur, Rani Tileshwari Kuari was recorded as owner of a moiety. He says in his evidence that after the death of his father he and his brother had a conversation on the subject, when it was arranged that they should consult pleaders at Gorakhpur. They (the two brothers) accordingly went to Gorakhpur and held a meeting. Amongst other pleaders who were invited to the meeting was Munshi Chotu Lal, who gives a detailed account of what occurred. He says that Mr. Read, Babu Bhairon Prasad, Munshi Gobind Ram Das, Karim Khan, Lala Harihar Datt and himself were present, and he also has a faint recollection that Mr. Nundy, Barrister-at-law, was present. Sarabjit wanted, he said, to have his name recorded in respect of half of the Riasat, while Raja Satrujit refused to give him anything except maintenance and would not allow his name to be recorded in respect of any portion of the estate. The matter was debated for an hour and-a-half or two hours and the history of the family was discussed. The terms of the iqarnama were then, he said, arranged and the witness was deputed to prepare a draft. He says that whilst he was making the draft the employés of the Raja and of Sarabjit used to be present and assisted him. Shiamdhari and Ram Lakhan Tewari represented the Raja, and Tannu Babu and Indarjit Lal represented Sarabjit. Eight or ten days were occupied in the preparation of the draft and some few points of difference remained open, which

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHI  
v.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHI  
v.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

were subsequently settled; and amongst others a condition was added to the effect that if the Raja should die without leaving male issue, the Raj should go to Sarabjit or his male descendants, and that if Sarabjit should die without leaving male issue, then the Raja or his male issue should take Sarabjit's share. He says that during the settlement of terms one material point on which the brothers differed was that Sarabjit asked that the shares which were given collectively to the three younger sons of Fateh Sahi as Babuai allowances, *i.e.*, a seven and a quarter ( $7\frac{1}{4}$ )-anna share should be given to him. At that time, he says, Sarabjit admitted that he was entitled to Babuai allowance only, and that "the Raj and the custom of the family were admitted," that there was no question whether the Raj was partible or impartible, the only point in dispute was how much Babuai allowance should be allotted to Sarabjit. Sarabjit says in his evidence that if he had known before signing this agreement that Raja Fateh Sahi had given shares of the property to his three younger sons he would never have signed it. In this he is confuted by the evidence of Munshi Chotu Lal and other evidence, and it is highly improbable that this matter was not mentioned. He further says in the course of his evidence that at the meeting of the pleaders, Mr. Read, turning to his brother, said:—"If Tamkohi is a Raj, then the younger brother is entitled to get simply Babuai allowance: and if Tamkohi is a Raj zamindari, then the younger brother is entitled to a half share in it." He says that no pleader except Mr. Read said anything in his presence; there was no question put to any pleader; that he sat in the room for from 5 to 10 minutes, and that the meeting was over in ten minutes. This is clearly not true. Later on he says that he did not utter a single word at the meeting, nor did his brother; that after the pleaders had gone away his brother said to him that the pleaders were of opinion that he should get a 2-anna share and that an agreement should be executed in which the share should be entered, and that he said in reply:—"If the opinions of the pleaders were in accordance with the custom of the family, and such was the custom of the family, there was no need for the execution of an agreement;" that to this his

brother replied that:—"As regards this also he would obtain opinions of pleaders whether an agreement should be executed or not," and that his brother told him that "the opinions of the pleaders was in accordance with the custom of the family." Nand Kishore Lal, a mukhtar, who has been acquainted all his life-time with the Tamkoshi estate, his father having been Peshkar of Raja Kharag Bahadur Sahi, and he himself having transacted the business of the estate as Court mukhtar from the time when he obtained his certificate in 1885, proves beyond question that Sarabjit knew more about the family history than he admitted in his evidence. This witness attended the funeral feast of Raja Krishan Partap on the invitation of Raja Satrujit, and he says that at the instance of the Raja he had a conversation with the plaintiff Sarabjit in reference to his claim. He says that Sarabjit told him that he wanted the Raja to have his name entered as owner of half of the estate, but that the Raja was only willing to give him maintenance allowance. The witness asked him how he came to claim a half share in the estate, and told him that Raja Fateh Sahi gave a  $7\frac{1}{4}$ -anna share to his three younger children for maintenance, to which Sarabjit replied "that he knew that." The witness asked Sarabjit to consider over the matter, and went away, and a day after renewed the conversation, but nothing was decided. In the end, he says, Sarabjit told him that he was going to Salemgarh, where the descendants of Shamsher lived, to make enquiry there, and on his return would state what he would do. He went, he says, to Salemgarh and returned on the following evening, and on the following morning the witness went to him and asked him what he had decided to do. Sarabjit told him to go to his brother and ask him to give him a  $7\frac{1}{4}$ -anna share as Fateh Sahi had given to his three younger sons. The witness went to the Raja and represented this to him, but the Raja refused to comply, and said that if Sarabjit wishes to have some villages for his maintenance, he would have no objection to give them to him. Then the witness says that he gave the brothers the following advice:—"Both of you brothers had better go to Gorakhpur and there convene a meeting of the pleaders and take their advice as to what each brother

1904

SARABJIT  
PARTAP.  
BAHADUR  
SAHI  
v.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHI

v.

INDARJIT  
PARTAP  
BAHADUR  
SAHI.

should get in the estate. Except loss, there is no profit in litigation." The brothers, he says, consented to this and hence the meeting of the pleaders at Gorakhpur to which we have referred. We have no reason to doubt the complete truthfulness of this evidence. It is manifest from it that Sarabjit was aware of the arrangements made by Fateh Sahi in regard to his estate, and that he consulted his relatives at Salemgarh in reference to the matter and then abandoned his claim to a moiety, contenting himself by putting forward a claim to the same share of the estate which had been allotted to the three younger sons of Fateh Sahi. He was no doubt satisfied upon enquiry that the estate was impartible and that he was only entitled to Babuai allowance. Being so satisfied, no doubt, and seeing that it was in the discretion of his brother to give him merely such monthly allowance as he might think fit, he came to the conclusion that he would act wisely in accepting the terms which were embodied in the iqarnama. Shiamdhari Tewari, who had been in the service of the Tamkohi estate for 9 or 10 years, accompanied Raja Satrujit and Sarabjit to Gorakhpur on the occasion when they consulted the pleaders, and he corroborates the evidence of the two witnesses for the respondent to which we have referred. He says that Sarabjit inquired of him who were good pleaders in Gorakhpur in addition to the pleaders who had been invited to the meeting. The witness mentioned the names of Lala Harihar Dat and Munshi Karim Khan as good men and also Mr. Nundy. Sarabjit then told him to speak to the Raja and ask him to invite these three persons to the meeting, and this was done. He says that at that meeting the Raja had a pedigree of his family in his hand and told the pleaders that the ancestor of his family was Fateh Sahi. He was the Raja both of Hansapur and Tamkobi, and that he had given the Raj to his eldest son and Babuai allowance to his other three sons. Sarabjit then said that Fateh Sahi had given  $8\frac{3}{4}$ -anna share to his eldest son,  $3\frac{1}{4}$ -annas to his second son and 2 annas to each of his two other sons and, therefore, he should get  $7\frac{1}{4}$ -anna share in lieu of his Babuai allowance. After a long conversation, he says, which lasted for an hour and-a-half the pleaders were of opinion

that the Raja should give Sarabjit a 2-anna share of the estate just as Fateh Sahi had given to Shamsheer Sahi. The Raja at first objected to this, saying that he did not want to have the share of the Kuar Sahib ascertained in annas and pies, but eventually yielded to the views expressed by the pleaders. Later on, he says, Sarabjit objected that his name would not be mentioned in the mutation proceedings, and that there was no guarantee that he would get the 2-anna share. The pleaders then said that he ought to obtain an agreement from the Raja, and it was thereupon settled that Lala Chotu Lal should draw up a draft of the agreement. This evidence leaves no doubt on our minds that the iqarnama was deliberately executed by Sarabjit after full and careful consideration of the circumstances of the family and with as full knowledge of its history as was in the possession of any member of the family. After consultation with his relatives at Salemgarh he abandoned the position which he at first took up, that the estate was partible, which was the real matter in dispute between the brothers. If the Raj was an impartible Raj, then the plaintiff was clearly only entitled to Babuai allowance. If the estate was partible, he was entitled to the half of the estate. This was the matter in issue between the brothers, and this was then finally decided and an agreement drawn up on the basis that the younger brother had abandoned this claim and was willing to accept the position taken up by his elder brother that the Raj was impartible. The question of the impartibility of the Raj was intended to be set at rest on this occasion. The iqarnama opens with a solemn declaration as to the family custom, and it seems to us now idle for the plaintiff Sarabjit to avoid the consequences of a deliberate and solemn act. It is to be noticed that no attempt was made to impeach this agreement during the life-time of Raja Satrujit. It was only upon his death, when the estate came into the possession of his infant child, that the idea of procuring its cancellation occurred to him. The admissions made by Sarabjit in this agreement are the strongest evidence against him.

We have now referred to the documents and oral evidence which have been mainly relied upon by the respective parties

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHI  
v.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.



1904

SARABJIT  
PARTAP  
BAHADUR  
SAHI

v.

INDARJIT  
PARTAP  
BAHADUR  
SAHI.

in support of their cases. After careful consideration of them the conclusion at which we have arrived is that Fateh Sahi before his expulsion from Saran held a considerable amount of property in the district of Gorakhpur and that that property formed and was treated as portion of the family estate, and that the custom of the family which is admitted to have prevailed in connection with the Hansapur Raj also extended to the estate lying on the west side of the Gandak. We hold therefore that the estate which devolved upon Raja Arimardan Sahi on the abdication of his father in his favour and withdrawal into seclusion was impartible.

It has been contended on behalf of the respondent that even if it were the case that neither the ancestors of Fateh Sahi nor Fateh Sahi himself owned any territory in Gorakhpur prior to the expulsion of Fateh Sahi from Saran, none the less the family custom would attend and follow the family and govern the devolution of any property which it or the head of the family might acquire.

This argument appears to us to have force, but having regard to the conclusion at which we have arrived upon the question of fact it is unnecessary to determine it. In India questions relating to every kind of property are governed by the personal law of the owner, and it has consequently been held that a Hindu who migrates from one part of the country to another will retain the law by which he was governed at the time of migration unless he elect to change his family custom and adopt the custom of the district into which he has migrated. In other words, a family which has family customs and usages will not necessarily lose them by migrating. The presumption is that the family which has moved from one district to another carries with it its family customs, and the onus is upon a party who alleges the discontinuance of any such custom to prove that fact—*Soorendro Nath Roy v. Mussamut Heeramonee Burmoneah* (1). As was pointed out by the Privy Council in the case which we have cited, orientals are commonly tenacious of their usages and customs, and therefore on the ordinary principles of viewing evidence a continuance of the existing

(1) (1868) 12 Moo., L. A., 81.

state of things is presumable. Well established discontinuance of family customs will, however, destroy them.

This brings us to the further argument which was advanced on behalf of the appellants, namely, that, assuming that Raja Fateh Sahi did hold property in Gorakhpur, and that the same was governed by the family custom of impartibility which it is admitted governed the devolution of the Hansapur estate, that custom has been discontinued and no longer can be regarded as binding. There is no doubt that a family custom may be discontinued. In the case of *Raj Kishen Singh v. Ramjoy Surma Mozoomdar* (1), the following passage appears in the judgment at page 195:—"Their Lordships cannot find any principle or authority for holding that in point of law a manner of descent of an ordinary estate depending solely on family usage may not be discontinued so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom which is *lex loci* binding all persons within the local limits in which it prevails. It is of the essence of family usages that they should be certain, invariable and continuous, and well established discontinuance must be held to destroy them. This would be so when the discontinuance has arisen from accidental causes; and the effect cannot be less when it has been intentionally brought about by the concurrent will of the family. It would lead to much confusion and abundant litigation if the law attempted to revive and give effect to usages of this kind after they had been clearly abandoned and the abandonment had been, as in this case, long acted upon." Let us see then whether the family usage in this case has been abandoned. It is necessary here to advert to the pedigree and to see in what way the succession has devolved since the death of Raja Fateh Sahi. After his abdication his eldest son, Arimardan Sahi, became the Raja, his younger brothers having been allotted shares by way of Babuai allowance under the sanads granted by Raja Fateh Sahi. Raja Arimardan Sahi died on the 21st February 1825 and was succeeded by his next brother, Dalmardan Sahi. Raja Dalmardan Sahi died in the year

(1) (1872) I. L. R., 1 Calc., 186.

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHI  
v.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHIv.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

1838 leaving a son, Dalip Sahi, who became the Raja. He died without issue some time before the year 1844, leaving a widow Musammat Usmedh Kuari. Upon his death Shamsheer Sahi, the third son of Raja Fateh Sahi, was clearly entitled to succeed as Raja. He, however, had, as we have already pointed out, instituted a suit for partition of the share which was allotted to him by Fateh Sahi and had succeeded in obtaining a decree which possibly gave him more than he was strictly entitled to. Whether it was that he considered that he had thus become separated from the family and had forfeited his right to succeed to the estate or not we cannot say. He does not appear to have advanced any claim on the death of Raja Dalip Sahi, but allowed Musammat Usmedh Kuari to have her name recorded as owner. He died on the 23rd of June 1847, and the only son who survived him, Sawant Sahi, died on the 19th of November 1848 without male issue. The person entitled on the death of Sawant Sahi to the estate, according to the family custom, was Kharag Bahadur Sahi, the grandson of Ran Bahadur Sahi, the fourth son of Raja Fateh Sahi. He lost no time in putting forward a claim to the estate. This claim was compromised by an arrangement made in 1851, whereby Musammat Usmedh Kuari purported to give him the property, reserving to herself a life-estate in certain villages. There is no doubt that Musammat Usmedh Kuari under the family custom had no title whatever to the property. In taking possession after the death of her son she undoubtedly committed an act of usurpation. This act is strongly relied upon by the appellants as establishing a discontinuance of the family custom.

Rani Usmedh Kuari was a sister of the then Maharaja of Benares, and appears to have been a clever woman. She, no doubt, on the death of her husband believed that she was entitled to the estate and she had her name accordingly recorded as owner. The witness, Ram Prasad Sahi, to portions of whose evidence we have already referred, says that on the death of her husband she forcibly took possession of the gaddi and that thereupon Raja Kharag Bahadur was about to institute a suit against her for recovery of it, when she consulted her brother, the Maharaja of Benares, who sent to her two persons of the

name of Gurdatt Chaudhri and Durga Singh Chaudhri, and they effected a compromise. The terms of the arrangement are embodied in the document No. 1015 of the record, dated the 31st of May 1851, which is described as a deed of gift. It recites that the fifth settlement of taluka Bank Jogni was made by Government with her father-in-law Raja Dalmardan Sahi as his ancestral zamindari and on his death all the properties left by him were recorded in the name of her husband Dalip Sahi; that afterwards Musammat Rajeshwari Kuari, mother of Raja Kharag Bahadur, recovered possession of a 7th share in all the villages and lands of the said taluka under a decree of the Court. Then follows a recital that Rani Usmedh Kuari has since the death of her husband been in exclusive possession of all the properties left by her deceased husband, except the share of Rani Rajeshwari Kuari, but that as she was a parda-nashin female, and had to look after the management of the estate and the collections and payment of the Government revenue and other payments, she had no time to perform worship, recite religious books and other matters of this kind. Then follows the statement that she has no other heir than Raja Kharag Bahadur, son of Raja Pirthipat Sahi. Then in the operative part of the instrument she purports to reserve 54 entire villages and Rs. 700 of malikana allowance from the birt villages for her necessary expenses during her life and to make an absolute transfer by gift of the remaining 87 villages, 33 entire pieces of land, and malikana allowance amounting to Rs. 1,440-9-6 to Raja Kharag Bahadur. On the same day Raja Kharag Bahadur signifies in writing his acceptance of the gift made to him by Rani Usmedh Kuari and the terms contained in it. In that document is a recital in the following words:—"After the death of the aforesaid Raja Dalip Sahi, my paternal aunt, Usmedh Kuari, is up to this date in possession and enjoyment of the property by right of inheritance, with the exception of one-eleventh share of my mother, and pays Government revenue." These two documents are strongly relied upon as establishing strong evidence of the discontinuance of the alleged family custom. The admission of Raja Kharag Bahadur that Rani Usmedh Kuari obtained the property by right of

1904

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SARABJIT  
PARTAP  
BAHADUR  
SAHIv.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHI  
v.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

inheritance is said to be wholly inconsistent with the continued existence of that custom. On behalf of the respondent it is said that it was immaterial to Raja Kharag Bahadur what the nature of the document was under which Rani Usmedh Kuari waived her claim to the estate, that, not unnaturally, she would not admit that she had usurped the possession of the estate, and that it was to save appearances that she made as it were a gift of the estate to the rightful owner. We think that there is a good deal in this explanation. No doubt Rani Usmedh Kuari claimed the estate by way of inheritance, believing that she was entitled to it, and it was a matter of little or no importance to Raja Kharag Bahadur what form her release of her claims took. The reason assigned in the deed for the gift, namely, that as she was a parda-nashin female and had to look after the management of the property, and therefore had no time for other matters, was evidently not a true one, for the management of the villages which she reserved for herself would entail little less expenditure of time and trouble than the management of the whole estate. It was this usurpation by Rani Usmedh Kuari which has in the main afforded to the plaintiffs a peg upon which to hang the argument that the family custom was abandoned.

The plaintiffs also, as we have mentioned, relied upon the fact that Raja Fateh Sahi divided the property amongst his sons, and the argument is that this disposition also was contrary to the family custom and evidence of its discontinuance. We have, however, almost contemporaneous evidence to prove the nature of that disposition in the petition which was filed by the sons of Raja Fateh Sahi on the 9th of April 1808, when they were endeavouring to recover from Government the Hansapur estate, and in the later petitions which were filed by Raja Arimardan Sahi, to which reference has already been made in an earlier part of our judgment. These documents show that the estate was regarded as an impartible Raj. If the estate had not been so regarded, then on the death of Raja Arimardan Sahi his brothers Dalmardan and Shamsher Sahi and nephew Pirthipat Sahi, son of his brother Ran Bahadur, who was then dead, would have been jointly entitled to it as his heirs; but Dalmardan



Sahi alone succeeded to the estate and became the Raja. On his death his son Raja Dalip Sahi succeeded, and then followed the usurpation of his widow Rani Usmedh Kuari. Then when litigation was imminent between her and Raja Kharag Bahadur, who was then the rightful heir to the property, she gave up the estate to him in 1851, reserving to herself a life estate in portion of it. Raja Kharag Bahadur was succeeded by his only son Raja Krishan Partap, the father of the plaintiff Sarabjit Partap. Under such circumstances we are unable to hold that the break in the succession caused by Usmedh Kuari's usurpation, or any other circumstances upon which the plaintiffs rely, establishes a discontinuance or abandonment of the pre-existing and long established custom.

We now come to consider the effect of the iqrarnama. We shall assume for the moment that the estate was not an impartible Raj and come to consider the effect of this agreement. That it was entered into with the utmost deliberation there can be no doubt. The plaintiff Sarabjit made a claim to half the estate. The answer of Raja Satrujit to this claim was clear and precise, namely, that the estate was impartible and that Sarabjit was only entitled to Babuai allowance. Upon this Sarabjit consulted his relatives at Salemgarh, and evidently met with no encouragement from them, for on his return we find he abandoned his claim to the half of the estate and sought a share of the estate equal to the shares which Raja Fateh Sahi had given to his younger sons. This claim Raja Satrujit considered extravagant, and refused. Then it was that the two brothers held the consultation with the pleaders which we have fully stated and the agreement was drawn up and signed. The basis of the negotiation was in reality the admission of Sarabjit that the Raj was an impartible Raj. Sarabjit admits in his evidence that he read the agreement before he signed it and understood that a 2-anna share was being given to him and a 14-anna share to his brother, and he further says that, at the time he signed it, he was not dissatisfied or displeased with the division of the property. It was later on, after the visit of Sarabjit to Calcutta, where he went to consult counsel, that he conceived the notion that the agreement was based upon a mistake of fact

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHIv.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

1904

SARABJIT  
PAETAP  
BAHADUR  
SAHI

v.

INDARJIT  
PAETAP  
BAHADUR  
SAHI.

and should be set aside. Mr. *Chaudhri* admitted that he could not mention any matter which came to the knowledge of the plaintiff Sarabjit from the date of the execution of the iqarnama down to the date of the institution of the suit which would entitle him to have the iqarnama cancelled, unless it were the opinion of Sir Charles Paul, whom he appears to have consulted, and what he heard from his mother. We may point out that the agreement was prepared and executed in the interests and for the protection of Sarabjit. He was apprehensive that as his name would not be recorded as owner of any part of the estate he might have difficulty in getting possession of the 2-anna share when he should desire to become separate from his brother. It was to satisfy his apprehensions on this score that the drawing up of an agreement was suggested. In the course of his evidence Shiamdhari, who was present at the negotiations, says:—"As regards mutation of names it was settled that it would be effected in favour of Raja Sahib. Thereupon Kuar Sahib (*i.e.*, Sarabjit) said:—"My name will not be mentioned in the mutation proceedings. I will get the two annas when I will become separate. What guarantee then have I that I will get the two annas?" The pleaders said that he ought to obtain an agreement to that effect from the Raja Sahib, and it was arranged that Chhotu Lal should draw up the draft." Under the agreement it is to be observed Sarabjit secured for himself property of the annual value of about Rs. 30,000, a very substantial allowance for a younger brother. According to the custom of the family his brother might have fixed his allowance at, say a monthly sum of Rs. 250. It was in his discretion to do so. In addition to this under the iqarnama he will on separation be also entitled to a one-eighth share of all the movable property, including any savings which there might be from the date of the agreement up to the date of separation. There is not, as we have before said, the slightest foundation for the allegation of Sarabjit that the execution of this agreement by him was procured improperly. The allegation of fraud and misrepresentation has been withdrawn, and properly withdrawn, for there was not a tittle of evidence to support it, and it ought never to have been made. The agreement was entered into with the

utmost deliberation and with as full knowledge on the part of Sarabjit of all the circumstances of the family as was available. It is idle therefore to set up a case of mistake and to ask the Court to set aside an arrangement made for the purpose of adjusting the differences between the two brothers and preserving the peace of the family. This agreement, we hold, is certainly binding on the plaintiff Sarabjit. But is it also binding upon his son, Chhatarpat, who was no party to it? The learned Subordinate Judge has given a reply in the negative to this question. We are unable to agree with him in this. It is clear that the two brothers intended that the agreement should be binding upon their descendants. In the opening part of it is the declaration that it shall be binding upon them, the executants, and their male descendants. Later on in the deed is the following passage:—"Both of us, the executants, have mutually executed this deed of agreement, of our own accord and free will, in a sound state of body and mind, and we and our male descendants are and will be bound by it. This Raja Satrujit Partap Bahadur Sahi shall have no right contrary to the conditions and contents of this document to object to giving to Babu Sarabjit Partap Sahi or his male descendants at the time of separation the one-eighth share detailed in paragraph 4 of this document, with the exception of the property mentioned in clause E of that paragraph. In the same way Babu Sarabjit Partap Bahadur Sahi or his male descendants shall have no right at the time of separation to claim more than the property detailed in paragraph 4 of this document." Mr. Mayne in his work on Hindu Law, 6th edition, at page 623 and following page says:—"It is now quite settled that a partition made during the minority of one of the members (*i.e.*, members of a joint Hindu family) will be valid, and if just and legal will bind him. Of course his interest ought to be represented by his guardian or some one acting on his behalf, though I imagine that the fact of his not being so represented will be no ground for opening up the partition, if a proper one in other respects." We may also refer to West and Buhler's Digest, page 672, and Dr. Jolly's History of the Hindu Law, pp. 99-100, 138 and 129. It is difficult to see how a partition could in many cases take place if this were

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHIv.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHI  
".  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

not so. If a father can bind his minor son by partition proceedings, *a fortiori*, as it seems to us, he can bind him by a compromise whereby Babuai allowance is fixed and a dispute in regard to family property is terminated. In the case of *Pitam Singh v. Ujagar Singh* (1) it was held that a son who was not a party to a suit brought by his father in respect of property in which the son had an interest was bound by a compromise entered into by his father and by a decree passed on that compromise. Pearson and Turner, JJ., in delivering the judgment of the Court in an appeal from a decree of the Subordinate Judge of Mainpuri observe as follows:—"Assuming, which is not certainly proved, that the family remained joint until 1867, the respondent's father for all intents and purposes represented the interest in the estate which devolved and would on partition fall to the separate share of himself and his children, and the respondent must be bound by his acts unless he can show such fraud and collusion as would entitle him to relief on those grounds." In the case of *Chanvirapa v. Danava* (2), it was held that a partition made by a mother as the guardian of her minor son who was a member of an undivided family is valid, and if just and legal will bind the minor. Holding, as we do, that the estate in dispute is an impartible Raj, it is obvious that the compromise entered into between the two brothers was altogether favourable to the interests of the minor plaintiff Chhatarpat; and even if there existed at the time of the execution of the iqrarnama some more solid foundation for the claim of Sarabjit than that upon which his claim was based, the compromise cannot, we think, be said to be unreasonable or unjust. It was we think a just and fair settlement of a family dispute—a dispute which might have led to disastrous litigation. For these reasons we hold that the iqrarnama is binding, not only on Sarabjit, but also on the minor plaintiff.

We have now disposed of the principal questions raised in this appeal, and we come to the alternative case set up by the plaintiffs. They allege that Raja Kharag Bahadur derived his title to part of the property in dispute under a gift from Rani

(1) (1878) I. L. R., 1 All., 651.

(2) (1894) I. L. R., 19 Bom., 593.

Usmedh Kuari and that his mother Rani Rajeshwari Kuari purchased some villages with funds supplied to her by her father and that these villages were recorded in the name of her husband Raja Pirthipat Sahi and devolved upon Raja Kharag Bahadur as absolute owner, and that he, a few days before his death, executed a deed of gift, in favour of his wife Rani Tileschwari Kuari of a moiety of these villages. These properties are set forth in schedules B1 and B3 appended to the plaint. Raja Kharag Bahadur is also said to have been absolute owner of the villages mentioned in schedule B2.

[A portion of the judgment, dealing merely with the evidence as to the title to certain specific properties claimed by the plaintiffs appellants, is here omitted.—Ed.]

Schedule E comprises property which is said to have been the self-acquired property of Raja Krishan Partap, and so to be property which would devolve upon members of his family in accordance with the ordinary principles of Hindu law and not according to family custom. It appears that this property was thus acquired. Rani Rajeshwari Kuari, grandmother of Raja Krishan Partap, was sister of Babu Benode Narain, who held zamindari property, known as Raj zamindari Tikari, in the district of Gaya. Raja Krishan Partap laid claim to this property by right of inheritance against Ram Bahadur Sahi, who claimed to be the owner of it. His suit was dismissed by the District Judge of Gaya, whereupon an appeal was filed by him to the Calcutta High Court. A compromise was come to whereby Krishan Partap relinquished his claim to the property in dispute on the terms that Benode Narain should grant to him a mukarrari lease of the villages comprised in schedule E. In accordance with this compromise the mukarrari lease was granted and the property has since been held under it. The plaintiffs contend that this property cannot be regarded as part of the Tamkohi estate or subject to the custom governing the devolution of that estate. It seems to us that it was quite open to Raja Krishan Partap upon the acquisition of this property to have treated it as separate private property or to incorporate it with and treat it as part of the Tamkohi estate. But the only object of acquiring property as private property would

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHI  
v.  
INDARJIT  
PARTAP  
BAHADUR



1904

SARABJIT  
PARTAP  
BAHADUR  
SAHI  
v.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

be for the purpose of alienation, and we think that if the owner of an estate, the devolution of which is governed by family custom, does not in his life-time alienate the property so acquired, or dispose of it by his will, or leave behind him some indication of a contrary intention, the reasonable presumption is that he intended to incorporate it with the family estate (see *Lakshmipathi v. Kandasami* (1), and *Ramsami Kamaya Naik v. Sundaralingasami Kamaya Naik* (2)). The plaintiff Sarabjit in his evidence admitted that he regarded this property as included in and forming part of the Tamkohi estate at the time he signed the iqarnama. He says:—"I believed that all the properties situate in the districts of Gorakhpur, Basti and Gaya formed part of the Tamkohi Raj." It is clear from the language of the iqarnama that this property was not excluded from its operation. The only property which was excluded is mentioned in paragraph E of that document, namely, the Muzaffarpur property, which Raja Satrujit obtained from his father-in-law. Munshi Indarjit Lal, who had been making collections on behalf of the Raja of the whole of the zamindari property since the year 1880, in the course of his evidence said that the whole of the zamindari estate in which collections were made were in his charge, including mukarrari villages, and that he was by an order of the Raja, dated the 8th of April 1882, directed to submit an account of receipts and disbursements to the Maharaja's agent Mr. Braidwood, and was also by another order directed to apply money in his hands under the order of the agent, and that he attended to these orders. Whatever profits, he says, came to his hands, which would include the profits of the Gaya property, were sent by him to the manager. This shows that the profits of the Gaya property, were not separately dealt with, but were mixed up with those of the other properties so as to form a common fund. In the power of attorney by which Mr. Dallas Campbell was appointed manager of the estate by Raja Satrujit and Rani Tileshwari Kuari, dated the 2nd of June 1895, the zamindari is described as including not merely the property in Gorakhpur and Basti but also the property in Gaya

(1) (1892) I. L. R., 16 Mad., 54.

(2) (1898) I. L. R., 17 Mad., 422.

and Saran. Mr. Campbell was appointed general attorney and also manager of these properties. There is no suggestion here that the Gaya property did not form part of the estate. Paragraph 2 of the iqarnama emphasizes the view which the plaintiff Sarabjit had formed upon this question, and shows beyond doubt that he regarded all the property then in the possession of the Raja, with the exception of the Muzaffarpur property, as part of the Raj. Not merely did he regard the immovable property but also the movable property, which his brother possessed, as forming part of the Raj. Under that agreement he will be entitled on separation to a one-eighth share of the entire property, movable and immovable, appertaining to the Raj-riasat existing at the time of separation. It is clear we think from what we have pointed out in the evidence that Raja Krishan Partap did not treat or regard any portion of the property which is now claimed as separate and distinct from the Raj property, and this applies to the movable as well as the immovable property claimed. He did not in his life-time make any disposition of the estate, nor did he in any way indicate an intention on his part to treat any portion of it otherwise than as part and parcel of or appurtenant to the Raj. He did not execute a will, but allowed the property to devolve in accordance with the old and well established family custom. On his death the plaintiff appellant Sarabjit did not suggest that any part of the property was held on a distinct and separate title from that of the Raj. On the contrary he deliberately, and after obtaining legal advice in regard to his position, executed the iqarnama on the basis that all the property now in dispute formed portion of the estate and descended in accordance with the family custom. In regard to the movable property we agree in the view entertained by the learned Subordinate Judge that it is appurtenant to and part of the Raj estate, and as such passed to the defendant Raja Indarjit. This point it would be unnecessary to decide, if we be right in thinking that the iqarnama is binding on both the defendants, for if it be, it is obvious that the claim in regard to the movable property can no more be supported than the claim to the immovable property. The plaintiffs appellants have wholly failed to

1904

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SARABJIT  
PARTAP  
BAHADUR  
SAHI  
v.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

1904

SARABJIT  
PARTAP  
BAHADUR  
SAHI  
v.  
INDARJIT  
PARTAP  
BAHADUR  
SAHI.

satisfy us that the learned Subordinate Judge has come to a wrong conclusion on any of the matters dealt with in his exhaustive judgment. We differ with him only in the opinion which he expressed that the minor plaintiff is not bound by the iqarnama, but in other respects we entirely agree in his conclusions.

For these reasons we hold that the appeal fails, and we dismiss it with costs.

*Appeal dismissed.*

1904  
August 8.

*Before Mr. Justice Blair and Mr. Justice Banerji.*

GANGA RAM (PLAINTIFF) v. KANHAIYA LAL AND OTHERS (DEFENDANTS).\*

*Mortgage—Suit for sale—Premature suit decreed in part on confession of judgment by some of the defendants—Subsequent suit for balance of the mortgage debt—Act No. IV of 1882 (Transfer of Property Act), section 90.*

In a usufructuary mortgage of a shop a separate dwelling house was hypothecated as collateral security. The dwelling house was subsequently sold to third parties. Before the expiry of the term of the mortgage the mortgagee brought a suit to recover the mortgage debt with interest, and the cost of certain repairs to the shop, by sale of both the shop and the dwelling house. This suit was decreed as against the representatives of the mortgagor, who confessed judgment, but dismissed as against the purchasers of the house as premature. After the expiry of the term of the mortgage, the plaintiff brought a second suit asking for sale of the dwelling house. *Held* that this second suit was not barred. The defendants purchasers, having formerly pleaded that the plaintiff's suit was premature, could not now plead that his present claim ought to have been included in it; and neither section 90 of the Transfer of Property Act, 1882, nor section 244 of the Code of Civil Procedure applied.

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Sundar Lal* and Babu *Lalit Mohan Banerji*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondents.

BLAIR and BANERJI, JJ.—The facts out of which this suit arose are these:—On the 6th of August 1878, one Muhammad Azim made a usufructuary mortgage of a shop, the term of the mortgage being 20 years. It was agreed in the mortgage deed that the usufruct was to be taken in lieu of interest and that

\* Appeal No. 53 of 1903, under section 10 of the Letters Patent.

1904

GANGA  
RAM  
v.  
KANHAIYA  
LAL.

redemption was to take place on payment of the principal. The mortgage deed further stipulated that in the event of the shop proving insufficient for the discharge of the mortgage the mortgagee was to recover any balance due to him from a dwelling house which was specified in the mortgage deed. It is clear, and indeed it is admitted, that the dwelling house was a part of the mortgaged property. That house was sold subsequently to the mortgage in execution of a simple money decree, subject to the mortgage, and has now passed to the defendants respondents. In the year 1888, before the expiry of the term of the mortgage, the plaintiff brought a suit for recovery of the money secured by the mortgage, and a further sum of Rs. 70 which he said he had spent in repairing the mortgaged shop. The claim embraced a prayer for the sale of the shop, and, in the event of the proceeds of that sale being insufficient for the satisfaction of the mortgage money, for the sale of the dwelling house. The suit was not resisted by the heirs of the mortgagor, who had died in the meantime. On the contrary, some of them appeared and confessed judgment. The present defendants respondents resisted the claim, mainly on the ground that no cause of action had accrued to the plaintiff and the suit brought before the expiry of the 20 years term of the mortgage was premature. The Court of first instance found in their favour and held that the plaintiff had no right to bring his suit before the expiry of the 20 years. It accordingly dismissed the claim against the present defendants, but having regard to the fact that some of the heirs of the mortgagor had admitted the claim, it made a decree against those heirs for the sale of the shop with which the mortgagor was concerned. The plaintiff appealed, and his appeal was dismissed by the lower appellate Court, that Court agreeing with the Court of first instance that no cause of action for the suit had arisen and that the suit was premature. The Court, however, made a decree against all the heirs of the mortgagor for the sale of the shop and dismissed an objection preferred by the defendants under section 561 of the Code of Civil Procedure, to the effect that upon the Court's finding that the suit was premature the whole suit ought to have been dismissed. That decree of the lower appellate Court

1904

GANGA  
RAM  
v.  
KANHAIYA  
LAL.

became final, and in execution of it the mortgaged shop has been sold and a sum of Rs. 425 has been realized. The plaintiff brought the present suit to recover the balance due to him out of the total mortgage money, that is to say, the principal, interest and costs, and for the sale of the dwelling house comprised in the mortgage as mentioned above and now in the possession of the defendants. The Court of first instance made a decree in favour of the plaintiff for a part of the amount claimed, but the lower appellate Court gave him a decree for the full amount claimed. The defendants appealed to this Court, and the learned Single Judge of this Court before whom the appeal came dismissed the suit, mainly on the ground that the plaintiff's remedy was an application for a decree under section 90 of the Transfer of Property Act, and a second suit was consequently not maintainable. We are unable to agree in that view. It is manifest from the terms of the mortgage deed, and is indeed conceded, that the dwelling house is a part of the property comprised in the mortgage. That being so, no application could be made under section 90 of Act No. IV of 1882 for the sale of the dwelling house, it being a part of the mortgaged property. Section 244, Code of Civil Procedure, could not apply, inasmuch as the Court having dismissed the plaintiff's claim for the sale of the dwelling house, the plaintiff could not in execution of that decree apply for such sale. We have therefore to consider whether there is any other bar to the maintenance of the present suit. Having regard to the terms of the mortgage and to the findings arrived at in the first suit it is clear that that suit was premature and could not be brought until after the expiry of the full term of the mortgage. No order could therefore be made in the previous proceedings for the sale of the dwelling house. That is what the Court held in that case, and in so far as the Court in the former proceedings made a decree for the sale of the shop which was a part only of the mortgaged property, it probably acted erroneously. But whether it acted rightly or wrongly, the Court held as regards the property now in dispute that no cause of action had then accrued to the plaintiff. That is a decision binding between the parties, and upon the terms of the mortgage it is clear that the plaintiff's cause of



action in regard to the property which he now seeks to sell only arose on the expiry of the term of the mortgage and on the proceeds of the sale of the shop mentioned in the mortgage deed proving insufficient for the satisfaction of the plaintiff's claim. What the plaintiff ought to have done was to have brought a suit after the expiry of the term of the mortgage for the recovery of the mortgage money by sale of both the properties mentioned in the mortgage, the Court declaring the order in which each of those properties was to be sold. However, in the first suit the plaintiff got a decree for a part of his claim, namely, for the sale of one of the two properties the sale of which he had claimed in his suit. That decree cannot be a bar to the maintenance of the present suit. Indeed, it would be working great hardship and injustice to the plaintiff if the defendants were allowed to defeat the first suit on the ground that it was premature and to defeat the present suit on the ground that the present claim ought to have been included in the first suit. The mere fact that a decree was passed in respect of this mortgage does not in our judgment extinguish the plaintiff's security in regard to the property which was excluded from the decree in the prior suit. We think that the Courts below were right in holding that the plaintiff's suit was maintainable. We are also of opinion that the lower appellate Court has rightly decreed the whole of the plaintiff's claim. Under the mortgage the plaintiff is entitled to recover from the house such balance as might remain due to him upon the mortgage, for principal, interest and costs, besides costs of repairs, after the sale of the shop. It is this balance which the lower appellate Court has decreed to the plaintiff, and we think that Court was right. We accordingly allow the appeal, and, setting aside the decree of this Court with costs, restore that of the lower appellate Court.

*Appeal decreed.*

1904

GANGA

RAM

KANHAIYA

LAL.

1904  
August 8.

## REVISIONAL CRIMINAL.

*Before Mr. Justice Aikman.*

EMPEROR v. GANESHI LAL.\*

*Act No. XLV of 1860 (Indian Penal Code), section 183—Attachment—Warrant not in the possession of the amin at the time of making the attachment—“Lawful authority.”*

It is the intention of the law that when a public servant attaches property under a warrant in execution of a decree, he must have the warrant with him, otherwise the taking of the property is not lawful. *Empress of India v. Amar Nath* (1), referred to.

IN this case the facts found by the convicting Magistrate were as follows. One Gobind Prasad, a qurq amin of tahsil Sardhana, went on the 23rd of October 1903 to mauza Maharmati to attach some movable property in execution of a decree of the Court of Wards against Sami Khan. He attached two buffaloes which were pointed out to him by a servant of the Court of Wards as being the property of Sami Khan and took them away to the village chaupal, where he was proceeding to write a description of them, when one Ganeshi Lal came up. Ganeshi Lal claimed the cattle as his own, saying that they were temporarily in the possession of Sami Khan for grazing purposes only, and thereupon removed them from the custody of the amin, without, however, using any unnecessary violence for that purpose. When he made the attachment, the amin had not in possession the warrant which had been issued to him for that purpose. The Magistrate was of opinion that the absence of the warrant was in the present case not material “as no resistance was made at the time of the attachment, but after the attachment.” The Magistrate convicted Ganeshi Lal under section 186 of the Indian Penal Code and fined him Rs. 40. Against this order Ganeshi Lal applied in revision to the High Court.

Mr. W. Wallach, for the applicant.

The Assistant Government Advocate (Mr. W. K. Porter), for the Crown.

AIKMAN, J.—On the 15th of October last a warrant was issued to a qurq amin for the realization of a sum of Rs. 32-14-8,

\*Criminal Revision No. 365 of 1904.

(1) (1883) I. L. R., 5 ALL., 318.

together with Rs. 6-1-7 costs, due from Sami Khan under a decree of the Rent Court. The money was to be realized by attachment of the judgment-debtor's movable property. The warrant was returnable on the 23rd of October. On that day the qurq amin attached two buffaloes as the property of the judgment-debtor. As a matter of fact the buffaloes did not belong to the judgment-debtor, but to the applicant Ganeshi Lal. Ganeshi Lal resisted the taking away of his buffaloes; for this he has been convicted under section 186 of the Indian Penal Code of voluntarily obstructing a public servant in the discharge of his public functions, and sentenced to pay a fine of Rs. 40, or in default to undergo two weeks' simple imprisonment. Application has been made to this Court for the revision of this order on the ground that the amin had no warrant with him at the time of attachment, also that the two buffaloes belonged to the petitioner and not to the person whose movable property the amin had been ordered to attach. It is quite clear from the facts set out in the judgment that the case was one falling properly under section 183 and not under section 186 of the Indian Penal Code. It is an admitted fact that the amin when he attached the property had not the warrant with him. This in my opinion renders his taking of the property illegal. I hold this following the principles laid down in the case of *Empress of India v. Amar Nath* (1). When an amin attaches property under a warrant he must be in a position to show the exact amount for which the property is attached, as it is the privilege of the judgment-debtor to prevent the attachment by payment of the amount, and without having the warrant with him, the amin is not in a position to satisfy the judgment-debtor as to the amount he has to pay, and so enable him to exercise his right. I therefore hold that it is the intention of the law that, when a public servant attaches property under a warrant in execution of decree, he must have the warrant with him, otherwise the taking of the property is not lawful. For these reasons I think that the application must be granted. I may add that on the facts found, and especially with reference to the statement made by the

(1) (1883) I. L. R., 5 All., 318 at p. 321.

1904

EMPEROR  
v.  
GANESHI  
LAL.

1904

EMPEROR

v.

GANESHI

LAL.

Magistrate that no violent assault or criminal force was used, the punishment in any case was absurdly severe. For the reasons given above I quash the conviction and direct the fine, if paid, to be refunded.

1904

August 8.

*Before Mr. Justice Aikman.*

EMPEROR v. GANGA PRASAD.\*

*Act No. XLV of 1860 (Indian Penal Code), section 405—Criminal breach of trust—Definition.*

A clerk in a record room made over a document forming part of a record in his custody to a person who was entitled to the document, but who would otherwise have had to present an application on stamped paper in order to secure its return in a legal manner. *Held* that the clerk was under the above circumstances rightly convicted under section 409 of the offence of criminal breach of trust by a public servant.

THE accused in this case, one Ganga Prasad, was a clerk in the record room of the Meerut Collectorate. On a record in that record room relating to the village of Begamabad was a copy of a certain sale certificate. That sale certificate one Bhagwan Sahai had been summoned to produce in a Civil Court on the 23rd of May 1904. On that day Ganga Prasad was seen by the record-keeper, Muhammad Mohsin, passing out to Bhagwan Sahai, through a hole in the netting protecting one of the windows of the record room, a paper. The record-keeper at once followed Bhagwan Sahai, and obtained from him the paper, which he had in his hand, and which proved to be the copy of the sale certificate above referred to. Both Ganga Prasad and Bhagwan Sahai were convicted, the former under section 409 and the latter under section 409 read with section 109 of the Indian Penal Code. Ganga Prasad appealed to the Sessions Judge, who reduced the sentence of imprisonment passed on him from nine months to six, but otherwise dismissed the appeal. Ganga Prasad thereupon applied in revision to the High Court.

Mr. C. R. Alston, for the applicant.

The Assistant Government Advocate (Mr. W. K. Porter) for the Crown.

\* Criminal Revision No. 1464 of 1904.

AIKMAN, J.—The applicant, Ganga Prasad, was an employé in the record room of the Collector of Meerut. He was convicted by a Magistrate of the first class of an offence under section 409 of the Indian Penal Code (criminal breach of trust by a public servant) and sentenced to nine months' rigorous imprisonment, reduced on appeal to six months. In this application for revision it is contended by the learned counsel for the applicant that the facts found do not establish the offence of criminal breach of trust as defined in section 405 of the Penal Code. I cannot sustain this contention. I am of opinion that it is proved that the applicant being entrusted with a Government record disposed of a paper on that record in violation of an implied contract touching the discharge of his trust. That he did so dishonestly there can be no doubt. By his action the Government was deprived of money, it may be a small amount, which it would have received had return of the document been applied for in the usual manner, and there can be little doubt that the applicant did get some gratification for handing the document over. I am therefore of opinion that no sufficient ground is made out for interfering with the conviction. The learned counsel addressed me on the question of sentence. Taking into account the facts that the applicant will lose his appointment, that he has been already for a month in confinement and that the person to whom he handed the document is found by the learned Judge to have been entitled to get it back, I think some effect may be given to the plea as to the punishment. I reduce the term of imprisonment to that already undergone, and in addition I sentence the applicant to a fine of Rs. 25, or in default to two months' additional rigorous imprisonment. I allow the applicant ten days from the date on which this order is received by the District Magistrate within which to pay the fine. If the fine is not paid within the time allowed, the applicant must surrender or be arrested to undergo the term of imprisonment imposed in default of payment of fine.

1904

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EMPEROR  
v.  
GANGA  
PRASAD.



1904  
August 9.

*Before Mr. Justice Knox, Acting Chief Justice, and Mr. Justice Aikman.*

EMPEROR v. UDMI AND OTHERS.\*

*Criminal Procedure Code, section 110—Security for good behaviour—The taking of sureties without personal bonds or recognizances illegal.*

*Held*, that there is no provision of law by which a person required to find security to be of good behaviour can be called upon to provide sureties for his good behaviour without at the same time entering into his own bond for that purpose.

THESE were certain petitions purporting to be petitions of appeal submitted from jail by eight Sansias, who had been called upon to furnish security to be of good behaviour for a period of three years, and in default had been sent to prison. These petitions originally came before Burkitt, J., who referred them to a Bench of two Judges for the reasons given in the following order :—

BURKITT, J.—A curious point arises in this case. A Magistrate, acting under sections 110 and 112 of the Code of Criminal Procedure, issued notice to the applicants to show cause why they should not furnish sureties for their good behaviour for a certain period ; but, by some omission, whether accidentally or otherwise I cannot say, the Magistrate did not call on the applicants to show cause why they should not execute *personal* recognizances or bonds for their good behaviour. He simply made an order on them to show cause why they should not furnish sureties. Nevertheless when the applicants appeared to show cause, the order passed by the Magistrate under section 118 included an order to give personal recognizances as well as surety bonds for a term exceeding one year. The proceedings having been laid before the learned Sessions Judge, under the provisions of clause (2) of section 123 of the Code, that officer, noticing this irregularity in the procedure, while ordering the applicants to furnish sureties for their good behaviour, did not order them to give personal recognizances. The question then is, is the order bad because the summons to show cause did not call on the applicants to show cause why they should not be called on to enter into personal recognizances ? The question is a novel one, which, as far as I know, is not governed by any authority. I am not prepared to say that the order passed by the Sessions

\* Criminal Appeal No. 481 of 1904.

Judge under section 123 is a bad order because of the omission of any demand of personal recognizances from the applicants, but I think the question is one which deserves consideration. I therefore direct that for that purpose the record be laid before a Bench of two Judges.

The order of the Division Bench was as follows:—

KNOX, ACTING C. J., and AIKMAN, J.—Under section 110 of the Code of Criminal Procedure a duly qualified Magistrate can call upon a person to show cause why he should not be ordered to execute a bond with sureties; but there is no provision empowering him to call upon such person to provide sureties for his good behaviour without his at the same time giving his own bond. In the present case the persons from whom security was demanded were called upon to find sureties only. This order is a bad order and is not contemplated by the Code. We have no alternative but to set it aside. We quash the order. Any of the applicants who are imprisoned under the order will be at once released, and any sureties furnished under the order will be discharged.

1904

EMPEROR  
v.  
UDMI.

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## APPELLATE CIVIL.

1904

August 9.

*Before Mr. Justice Knox, Acting Chief Justice, and Mr. Justice Aikman.*

KUBER SINGH (JUDGMENT-DEBTOR) v. SHIB LAL (DECREE-HOLDER).\*

*Civil Procedure Code, sections 310A, 538—Appeal—No appeal from an order setting aside a sale under section 310A.*

*Held*, that no appeal lies from an order under section 310A of the Code of Civil Procedure setting aside a sale, whether the auction purchaser is the decree-holder or an outsider. *Mendai Lal v. Bhajja Singh* (1) referred to.

IN this case certain property belonging to one Kuber Singh was sold by auction in execution of a decree against him held by Shib Lal. The sale took place on the 20th of September 1901. On the 26th of September 1901 the Court of its own motion set aside the sale and ordered a resale of the property. The second sale took place on the 20th of November 1901. The

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\* Second Appeal No. 950 of 1903 from a decree of J. H. Cumming, Esq., District Judge of Aligarh, dated the 17th of July 1903, reversing an order of Babu Ishri Prasad, Munsif of Jalesar, dated the 23th of April 1903.

(1) Weekly Notes, 1895, p. 140.

1904

KUBER  
SINGH  
v.  
SHIB LAL.

decree-holder, who had himself bought the property at the first sale, successfully appealed against the order of the 20th of September 1901 setting aside the sale. An application for revision was filed in the High Court, which was dismissed on the 4th of December 1902. Within thirty days of the order of the High Court, namely, on the 23rd of December 1902, the judgment-debtor applied under section 310A of the Code of Civil Procedure to have the sale set aside, depositing with his application the amount required by the section. The Court of first instance (Munsif of Jalesar) granted the application. On appeal the District Judge of Aligarh set aside the Munsif's order on the ground that the application was barred by limitation, and dismissed it. From this order the judgment-debtor appealed to the High Court, pleading that no appeal lay from the order of the Munsif which had allowed his application and set aside the sale.

Mr. *E. A. Howard* and Babu *Lalit Mohan Banerji*, for the appellant.

Mr. *Abdul Raoof* and Babu *Parbati Charan Chatterji*, for the respondent.

KNOX, ACTING C.J., and AIKMAN, J.—In this case the appellant's property was sold in execution of a decree. The sale took place on the 20th of September 1901. On the 26th of September 1901 the Court of its own motion set aside the sale and ordered a re-sale of the property. The second sale took place on the 20th of November 1901. The decree-holder, who had himself bought the property at the first sale, successfully appealed against the order of the 20th September 1901, setting aside the sale. An application for revision was filed in this Court, which was dismissed on the 4th of December 1902. Within 30 days of the order of this Court, *i.e.*, on the 23rd of December 1902, the judgment-debtor applied under section 310A to have the sale set aside, depositing with his application the necessary amount. The Court of first instance granted this application; on appeal the learned District Judge set aside the Munsif's order on the ground that the application was barred by limitation, and dismissed it. The judgment-debtor comes here in Second Appeal. The first plea taken here is that no appeal lay to the District

Judge. We think this plea must succeed. When in 1894 the Legislature introduced the new provision of law embodied in section 310A, it did not see fit to add a clause to section 588 giving a right of appeal from an order under the new section. It has been held by the Calcutta and Madras High Courts that, when the auction purchaser happens to be the decree-holder, he has a right of appeal under the provisions of section 244(c) of the Code of Civil Procedure. With all deference to the learned Judges who have adopted this view, we think that it would be a straining of the language of clause (c) of section 244 to hold that it is wide enough to give an appeal from an order passed on an application under section 310A. No appeal lies when an outsider is the purchaser, and we see no reason why an appeal should lie merely because the decree-holder happens to be the person who has bid the highest amount at the sale. We note that in the case *Mendai Lal v. Bhujja Singh* (1) a Bench of this Court entertained an application for revision of an order under section 310A, remarking that section 310A makes no exception in the case of the decree-holder being the purchaser. Had an appeal been allowable in such a case, the Court could not have dealt with the case under section 622 of the Code of Civil Procedure, as it undoubtedly did.

For these reasons we sustain the first plea raised in this case. We allow the appeal with costs, and, setting aside the decree of the lower appellate Court with costs, we restore the order of the Court of first instance.

*Appeal decreed.*

(1) Weekly Notes, 1895, p. 140.

[See also *Bashir-ud-din v. Jhori Singh* (I. L. R., 19 All., 140).—ED.]

1904

KUBER  
SINGH  
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1904  
August 10.

Before Mr. Justice Aikman.

ALICE MARY HILL (PLAINTIFF) v. WILLIAM CLARKE (DEFENDANT).<sup>\*</sup>  
Act No. IX of 1872 (*Indian Contract Act*), section 24—Act No. I of 1872  
(*Indian Evidence Act*), section 92 prov. (1)—Contract—Unlawful consideration—Pleadings.

When it is brought to the notice of a Court that the consideration for a contract which it is asked to enforce is, in whole or in part, an unlawful consideration, such Court is bound to give effect to the fact thus brought to its notice, notwithstanding that the contract may appear upon the face of it to be a perfectly legal contract, and that the unlawfulness of the consideration therefore was never pleaded by the defendant. *Holman v. Johnson* (1), *Scott v. Brown, Doering, McNab & Co.* (2), *Gedge v. Royal Exchange Assurance Corporation* (3) and *Benyon v. Nettlefold* (4) referred to.

In India, adultery being an offence against the criminal law, cohabitation past or future, if adulterous, is not merely an immoral but an unlawful consideration. *Man Kuar v. Jasodha Kuar* (5) and *Dhiraj Kuar v. Bikramajit Singh* (6) referred to.

THE plaintiff in this case was a married woman living separate from her husband, and she sought to recover from the defendant, a married man separated from his wife, the sum of Rs. 550, arrears of a monthly allowance of Rs. 50, alleged to be due to the plaintiff under an agreement purporting to have been executed by the defendant on the 20th of November 1899. The material part of this agreement was as follows:—

“Whereas the latter (*i.e.*, the plaintiff) has devoted the best part of her youth (for over the last fifteen years) in my service in looking after my house at Agra and in always keeping it clean, neat and tidy, and my servants in order, and always giving me my meals in time to my satisfaction, so that I have never missed my train (the defendant was an engine driver) and has always attended to me in sickness, out of gratitude to her, and with the view that she may continue in my service, I bind myself, in case I may dispense with her services, to pay to her so long as I may be alive, Rs. 50 per mensem.” In addition to this monthly allowance, there was further provision for a payment to the plaintiff of Rs. 5,000 in case of defendant's death.

<sup>\*</sup> Second Appeal No. 342 of 1903, from a decree of W. F. Wells, Esq., District Judge of Agra, dated the 2nd of March 1903, reversing a decree of Babu Baidya Nath Das, Munsif of Agra, dated the 29th of November 1902.

(1) (1775) 1 Cowper, 341.

(2) L. R., 1892, 2 Q. B. D., 724.

(3) L. R., 1900, 2 Q. B., 214.

(4) (1850) 3 MacN. and G., 94.

(5) (1877) 1 L. R., 1 All., 478.

(6) (1881) 1 L. R., 3 All., 787.



1904

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ALICE  
MARY  
HILL  
v.  
WILLIAM  
CLARKE.

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The defendant denied execution of the agreement sued on; but this was found against him. No question was raised by the pleadings as to the possible illegality of the consideration for the agreement; but the defendant in cross-examination stated that he had always been addressing the plaintiff as "Mrs. Clarke," and that they had been living as husband and wife from 1891 to 1901. Upon this the Court of first instance (Munsif of Agra) framed the following additional issues, *viz.*, "(7) Can the plaintiff being a married woman sue for maintenance on past cohabitation? (8) Can the plaintiff change her case as disclosed in the plaint; has she really done so?" The Munsif found that past cohabitation was part of the consideration, but held that the agreement was not thereby invalidated, even though future cohabitation was in the contemplation of the parties. In the result the Munsif gave the plaintiff a decree for Rs. 150. The defendant appealed. The lower appellate Court (District Judge of Agra) held that future cohabitation was part of the consideration of the contract, and that as this involved the commission of an offence, namely, adultery, this part of the consideration was not merely immoral, but unlawful, and that under section 24 of the Contract Act this rendered the agreement void. The Court therefore allowed the appeal and dismissed the plaintiff's suit. From this decree the plaintiff appealed to the High Court.

Mr. R. K. Sorabji, for the appellant.

Mr. C. Dillon, for the respondent.

AIKMAN, J.—This appeal arises out of a suit brought by the appellant, Alice Mary Hill, a married woman, living separate from her husband, to recover from the defendant respondent, William Clarke, a married man, separated from his wife, the sum of Rs. 550, arrears of a monthly allowance of Rs. 50 alleged to be due to the plaintiff under an agreement purporting to have been executed by the defendant on the 20th of November 1899. The material part of the agreement is as follows:—

The defence raised various pleas; amongst them there was a plea that the document sued on had never been executed by the defendant. The defendant stated on oath that the signature on the agreement was not his. The learned Munsif found that

1904

ALICE  
MARY  
HILL  
v.  
WILLIAM  
CLARKE.

the signature on the agreement was Clarke's. When the case was taken in appeal by the defendant to the learned District Judge, no attempt was made in the argument to impugn the Munsif's finding as to execution.

The agreement on the face of it is a perfectly good agreement. Notwithstanding this, it would have been open to the defendant to seek to invalidate it by showing that the consideration or part of the consideration was in reality an illegal consideration—*vide* Proviso (1), section 92 of the Evidence Act. No such plea was taken in the written statement, and in the issues, as framed at first upon the pleading, no such question was raised.

It was left to the plaintiff's pleader to spoil his client's case by putting to the defendant, when examined as a witness for the plaintiff, the following questions, which, having regard to the pleadings and the issues which had been framed, were absolutely irrelevant:—

"How have you been addressing the plaintiff? Were you not living with Mrs. Hill as husband and wife?"

Objection was taken to these questions on the part of the defendant, who further claimed privilege on the ground that the answers would incriminate him. But, being compelled by the Court to reply, he said he had always been addressing the plaintiff as "Mrs. Clarke," and that they had been living as husband and wife from about 1891 to 1901.

Thereupon the following issues were added to those already framed:—

"Can the plaintiff, being a married woman, sue for maintenance based on past cohabitation?"

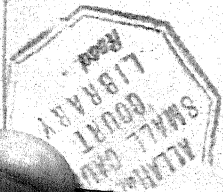
"Can the plaintiff change her case as disclosed in the plaint?"

"Has she really done so?"

The learned Munsif found that past cohabitation was part of the consideration, and relying on the decisions in *Man Kuar v. Jasodha Kuar* (1) and *Dhiraj Kuar v. Bikramajit Singh* (2), he held that the agreement was not thereby invalidated even though future cohabitation was in the contemplation of

(1) (1877) I. L. R., 1 All., 478.

(2) (1881) I. L. R., 3 All., 787.



the parties. Here I think the learned Munsif was in error. The cohabitation in the cases relied on by him is not shown to have been adulterous. In England a covenant founded on past cohabitation, even though adulterous, is valid in law. But in England, adultery is not an offence under the criminal law, whereas in India it is. If then adultery, past or future, is the consideration or an indivisible part of the consideration for an agreement entered into in India, this would, I hold, make it not merely an immoral but an illegal agreement, and the contract would be void.

In the result, the Munsif gave the plaintiff a decree for Rs. 150.

The defendant took the case in appeal to the learned District Judge, who allowed the appeal and dismissed the plaintiff's suit.

The learned Judge held that cohabitation was at least part of the consideration for the agreement; that the words in the agreement "with a view that she may continue in my service" showed that future cohabitation was a part of the consideration, and that as this involved the commission of an offence, to wit, adultery, this part of the consideration was not merely immoral, but unlawful, and that under section 24 of the Contract Act this rendered the agreement void.

The plaintiff comes here in second appeal.

I have taken time to consider my judgment, as it appeared to me doubtful whether, having regard to the pleadings, which raise no question of immoral or illegal consideration, and to the fact that on the face of it the agreement is a good one, it was open to the Court below to hold that the agreement was void as having been made for a consideration which was in part unlawful.

That the relations between the defendant and the plaintiff were not merely those of a master and his house-keeper is proved by the evidence of the defendant, and by the language of the letters, from the defendant to the plaintiff, which have been put in by her. There can, I think, be no doubt that the defendant and plaintiff cohabited as husband and wife.

The Courts below have found that this cohabitation was in the minds of the parties as forming part of the consideration for

1904

ALICE  
MARY  
HILL  
v.  
WILLIAM  
CLARKE.

1904

ALICE  
MARY  
HILL  
v.  
WILLIAM  
CLARKE.

the agreement, and sitting as a Court of second appeal, I cannot say that it was not open to the Courts to come to this conclusion on the materials before them. As to the question whether the Courts could come to such a finding, although the agreement was on the face of it a perfectly legal agreement, and notwithstanding the fact that no plea was raised by the defendant as to the illegality of the consideration, the authority of English cases is clearly against the pleas urged on behalf of the appellant.

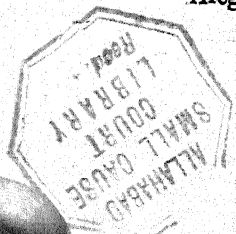
Leake, in his well known work on Contracts, 4th Ed., p. 551, says:—"Though the contract is apparently valid in form or matter, extrinsic evidence is always admissible in variance of or in addition to the contract to show that the transaction is illegal and therefore void, even in the case of a covenant or contract under seal." (This is also the law in India:—section 92, Proviso 1, Evidence Act.) He goes on to say:—"The facts showing illegality either by statute or common law must be pleaded, but when the illegality appears from the plaintiff's own evidence, it is the duty of the Court to take judicial notice of the fact, and to give judgment for the defendant, although the illegality is not raised by the pleadings."

In support of the last proposition the following authorities may be cited.

In *Holman v. Johnson* (1), Mansfield, L. J., said:—"If from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causa* or the transgression of a positive law of this country, there the Court says he has no right to be assisted." In the case of *Scott v. Brown, Doering, McNab & Co.* (2) Lindley, L. J., says:—"No Court ought to enforce an illegal contract, or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court will not assist him."

(1) 1775) 1 Cowper, 341.

(2) L. R., 1892, 2 Q. B. D., 724.



Again, in the case of *Gedge v. Royal Exchange Assurance Corporation* (1), it was held that when on the trial of an action the plaintiff's case discloses that the action which is the basis of his claim is illegal, the Court cannot properly ignore the illegality or give effect to the claim, even if the illegality be not pleaded or relied on by the defendant.

It is not, as was observed by Lord Mansfield in the case of *Holman v. Johnson*, for the sake of the defendant, that in such cases the Court declines to enforce the contract. It is "on the grounds of public policy, namely, that those who violate the law must not apply to the law for protection." Truro, L. C., in *Benyon v. Nettlefold* (2).

The Court below having found that part of the consideration for the agreement, the basis of plaintiff's suit, is unlawful, I am constrained, although I have no sympathy with the defendant, to hold, for the reasons and on the authorities set forth above, that the appeal fails, and I dismiss it. I make no order as to costs.

*Appeal dismissed.*

## PRIVY COUNCIL.

ACHAL RAM (DEFENDANT) *v.* KAZIM HUSAIN KHAN  
(PLAINTIFF).

[On appeal from the Court of the Judicial Commissioner of Oudh.]

*Vendor and purchaser—Sale by person out of possession but entitled to possession—Hindu Law—Chamerty and maintenance—Deed of sale of share of taluq in consideration of funds for suit to recover it—Public policy—Evidence of adoption.*

In order to provide funds to prosecute his claim to the Birwa Mehnou taluq a deed of sale, in favour of the respondent, of a moiety of the taluq was in 1888 executed whilst out of possession by a person who (if the adoption as successor to the Mankapur Raj of the head of a senior branch of the family in 1681 were proved) was entitled to succeed to the taluq as being the son of the collateral who was the nearest heir when the succession opened out in 1879 on the death of the daughter of the original taluqdar, whose husband, the appellant, then obtained possession. The taluq was one in lists 1 and 2 under Act I of 1869 and devolved on a single heir, though not descending by the rules of lineal primogeniture. The respondent as co-plaintiff with his

*Present* :—Lord MACNAGHTEN, Lord LINDLEY, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

(1) L. R., 1900, 2 Q. B. D., 214. (2) (1850) 3 MacN. and G., 94.

1904

ALICE  
MARY  
HILL  
*v.*  
WILLIAM  
CLARKE.

P. C.  
1904  
November  
18, 22 24.

1905  
February 9.



1904

ACHAL  
RAM  
v.  
KAZIM  
HUSAIN  
KHAN.

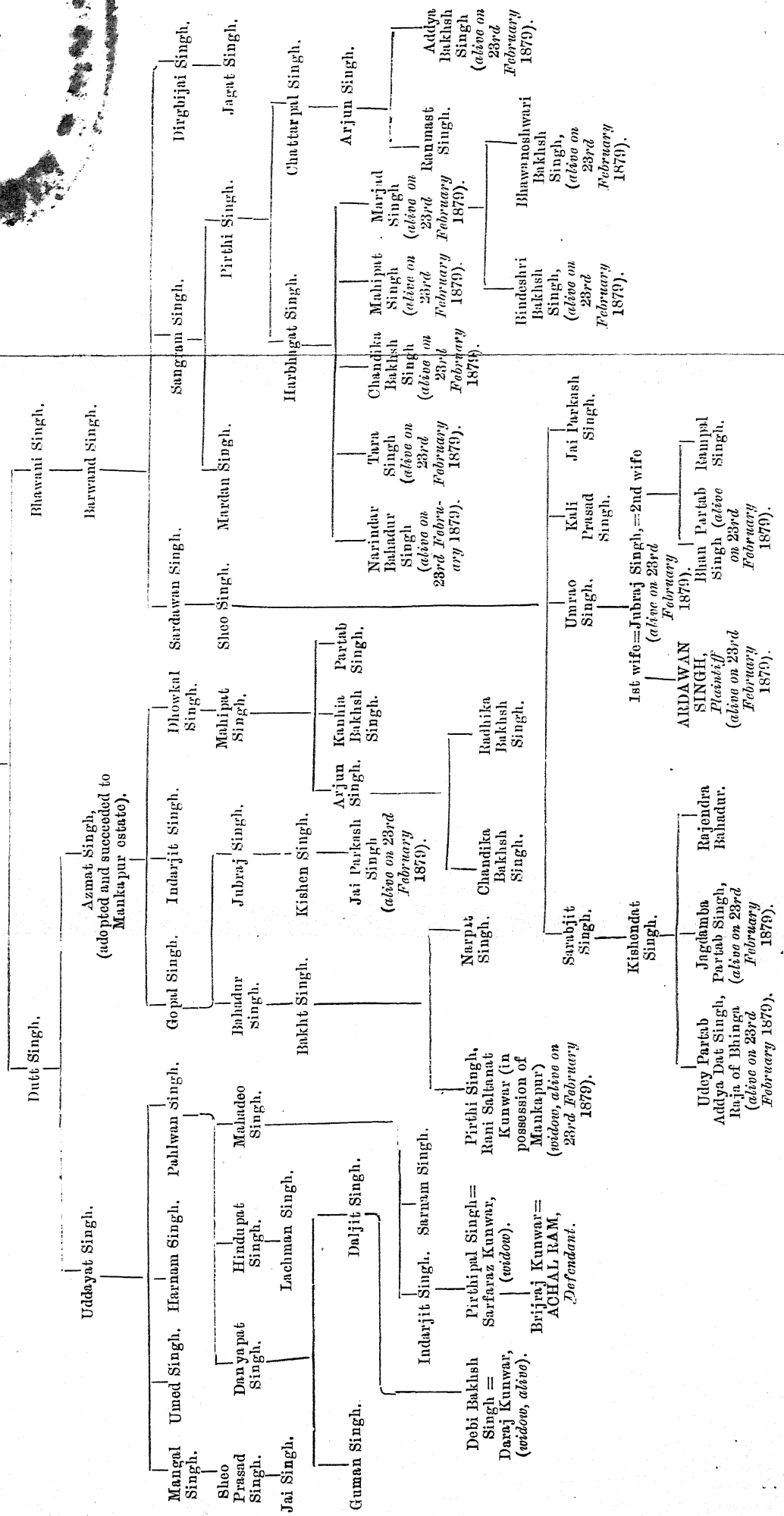
vendor brought a suit against the appellant to recover possession of the taluq. The vendor entered into a compromise and withdrew from the suit which was prosecuted by the respondent alone. The validity of the deed of sale was impeached by the appellant on the ground that it was champertous and contrary to public policy, it being contended that the suit was therefore not maintainable. *Held* by the Judicial Committee (affirming the decision of the Court of the Judicial Commissioners of Oudh) that the transaction was a present transfer by the vendor of a moiety of his interest in the taluq giving a good title to the respondent on which it was competent to him to sue. The vendor could not have prosecuted his claim to the estate without assistance; there was nothing extortionate or unreasonable in the terms of the bargain, no gambling in litigation, and nothing contrary to public policy.

*Held* also, with regard to the adoption, that notwithstanding it took place so long ago that it was impossible to prove that all requisite ceremonies were duly and regularly performed, and although no change of gotra occurred, evidence in favour of the adoption preponderated: a body of strong and persistent tradition preserved in the *wajid-ul-arz* of the Mankapur Raj and recorded in the Oudh Gazetteer and Gonda Settlement Report was in favour of it: it had been supported by the appellant in former litigation; and no claim to the Birwa Mehnon taluq had ever been set up by any member of the Mankapur family with which the adoption had been made. The decision of the Judicial Commissioners' Court upholding the adoption was therefore affirmed.

APPEAL from a judgment and decree (June 7th, 1899) of the Court of the Judicial Commissioners of Oudh, which reversed a decree (April 29th, 1896) of the Additional Civil Judge of Lucknow by which the respondent's suit had been dismissed.

The question in the appeal was as to the right of succession to the taluq of Birwa Mehnon in the district of Gonda in Oudh, the last male owner of which was Pirthipal Singh, with whom, after the confiscation of Oudh by the proclamation of 15th March 1858, the second Summary Settlement of the taluq was made in February 1859. On the preparation of the lists of taluqdars under section 8 of Act I of 1869 Pirthipal Singh's name was entered in lists 1 and 2, the taluq therefore devolving to a single heir but not necessarily according to the rule of primogeniture. He died on 3rd November 1859 and was succeeded by his widow Sarfaraz Kunwar: she died on 20th February 1870 and was succeeded by her daughter Brijraj Kunwar. Achal Ram, the appellant, was the husband of Brijraj Kunwar who died on 23rd February 1879, and by an order of the Deputy Commissioner of Gonda, dated 27th February 1879, Achal Ram was put into possession of the taluq.

The following pedigree explains the relationship between Pirthipal Singh and the various claimants to the taluq.



After the death of Brijraj Kunwar, Udey Partab Singh, the Raja of Bhinga, brought a suit on 24th of April 1879 against Achal Ram for possession of the taluq, claiming to succeed by the rule of lineal primogeniture. That suit was dismissed by the District Judge, decreed in favour of the Raja of Bhinga by the Judicial Commissioners' Court, and finally dismissed by the Privy Council on 30th November 1883, on the ground that though the taluq was descendible to a single heir, it did not necessarily descend by lineal primogeniture; that a custom of lineal primogeniture must therefore be proved, and, there being no proof of such custom, the suit must fail: see *Achal Ram v. Udai Partab Addiya Dat Singh* (1). Before this decision the Raja of Bhinga had obtained possession of the taluq in execution of the decree of the Judicial Commissioners' Court. A suit was brought against him by Narindar Bahadur, the son of Harbhagat Singh: the claim was dismissed by the District Judge on 19th July 1882, but decreed by the Court of the Judicial Commissioner on 13th August 1883, and Narindar Bahadur obtained temporary possession, being subsequently dispossessed by Achal Ram in execution of the decree of the Privy Council dated 30th November 1883.

Narindar Bahadur then sold a half share in the taluq to Raja Kazim Husain Khan, the present respondent in the benami name of Amin-ud-din, and on the 8th January 1886 Narindar Bahadur and Kazim Husain Khan jointly sued Achal Ram for possession of the taluq. That suit was dismissed by the Courts in India and an appeal to the Privy Council was dismissed on 3rd February 1893, the Judicial Committee holding that a family custom set up which would exclude daughters was not proved; that the succession therefore did not open when Sarfaraz Kunwar died, but on the death of Brijraj Kunwar, at which time Narindar Bahadur and Jubraj Singh were the nearest surviving collateral heirs of Pirthipal Singh, and that as Jubraj Singh was descended from the elder line, the taluq, as descendible to a single heir, would go to him in preference to Narindar Bahadur: see *Narindar Bahadur Singh v. Achal Ram* (2).

(1) (1883) L. R., 11 I. A., 51; I. L. R., 10, Calc., 511. (2) (1893) L. R., 20 I. A., 77; I. L. R., 20 Calc., 649.

1904

ACHAL  
RAM  
v.  
KAZIM  
HUSAIN  
KHAN.

1904

ACHAL  
RAM  
v.  
KAZIM  
HUSAIN  
KHAN.

On 11th August 1888 Ardawan Singh, the son of Jubraj Singh, sold a moiety of the taluq to Raja Kazim Husain Khan, the respondent, for Rs. 1,50,000, part of the consideration being that Kazim Husain Khan was to pay the costs of a suit against Achal Ram ; and the deed recited that a lakh of rupees had been paid to Ardawan Singh, but there was no proof that such payment was ever made. The suit was brought on 21st February 1891 in the Court of the District Judge of Fyzabad. The relief claimed in the plaint was possession of the taluq and of the village of Pirthipal Singh as appurtenant thereto. On 11th December 1891 Ardawan Singh executed a deed in favour of Achal Ram by which he withdrew from the suit. He also presented a petition of compromise under section 375, and on 14th December 1891 a further petition under section 373 of the Code of Civil Procedure (Act No. XIV of 1882). On the 22nd March the District Judge of Gonda, to whose Court the case had been transferred, struck off the name of Ardawan Singh from the plaint and on the appeal of Kazim Husain Khan from that order the Judicial Commissioners decided on the 19th September 1894, that he could in this suit recover the half share assigned to him if he could establish the title of Ardawan Singh.

On 22nd March the defendant filed his written statement in which he pleaded that Pirthipal Singh left a will dated 22nd October 1859 bequeathing all his property to his widow Sarfaraz Kunwar, who became thereby the absolute owner of it; that Sarfaraz in her life-time transferred two villages to her daughter Brijraj Kunwar by a deed dated 8th December 1869, and by a will dated 15th December 1869 she left the rest of her estate to her daughter, who became the absolute owner of the taluq, which on her death devolved upon Achal Ram ; that the Government had by an order of 5th August 1869 in certain settlement proceedings conferred on Sarfaraz Kunwar full proprietary title, and that therefore she and not Pirthipal Singh should be considered the stock of descent ; that daughters were excluded by custom and the suit was therefore barred by limitation ; that the next heir on an intestacy would be Jai Prakash Singh, a descendant of Azmat Singh, who had never been adopted into the

1904

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ACHAL  
RAM  
v.  
KAZIM  
HUSAIN  
KHAN.

Mankapur family; that even if Jubraj Singh was an heir he had transferred all his interest in the taluq to the Raja of Bhingra by a deed dated 25th December 1872; that the deed of sale of 11th August 1888 was champertous and fraudulent and conveyed no title to Kazim Husain Khan; that Ardawan Singh having withdrawn from the suit it was not maintainable by Kazim Husain Khan; that Pirthipalganj did not form part of the taluq; and that under no circumstances would the suit lie for possession of the whole property.

Twenty-four issues were settled, which raised all the questions in dispute on the pleadings.

The Additional Civil Judge decided adversely to the plaintiff on two issues only, the 3rd and the 9th and in the view he took of those held that it was unnecessary for him to dispose of the other issues. The 3rd issue was as to whether the deed of sale of 11th August 1888 (exhibit A) was enforceable. On that issue after considering the authorities cited for the defendant the Judge said :—

“ They have, I think, established the following principles, *viz.*, that an assignee or vendee of a property is not entitled to recover the said property on the basis of a champertous contract, unless he can show that he could recover it, if the property were in the hands of the assignor; that though the specific English Law of maintenance and champerty has not been introduced into India; and while fair agreements to supply funds to carry on litigation in consideration of having a share of the property if recovered should not be regarded as being, *per se*, opposed to public policy, yet such agreements should be carefully watched, and if extortionate and unconscionable or made not with the *bond fide* object of assisting, for a reasonable recompense, a claim believed to be just, but for the purpose of gambling in litigation, or if injuring or oppressing others by encouraging unrighteous suits they should be held to be contrary to public policy and should not be enforced. I therefore hold that Exhibit A does not represent the contract between the plaintiff Raja and Ardawan Singh, and if it does the plaintiff Raja has not carried out completely the terms of the said deed, *i.e.*, there has been failure of consideration and Exhibit A could not be enforced as against Ardawan Singh, and Exhibit A was obtained by the plaintiff Raja purely for the purpose of gambling in litigation in order to have a second string to his bow if Narendar Bahadur failed.”

The 9th issue raised the question of the adoption of Azmat Singh into the Mankapur family, which took place (as alleged) about 1681, and which, if proved, would make Jubraj Singh the



1904

ACHAL  
RAM  
v.  
KAZIM  
HUSAIN  
KHAN.

preferential heir on the death of Brijraj Kunwar. The evidence adduced by the plaintiff to support the adoption consisted of Exhibit P. 15, the *wajib-ul-arz* of Ashrafpur, pargana Mankapur, prepared in the time of Rani Saltanat Kunwar of Mankapur and attested by one Mahfuz Ali described as the Mukhtar-am of the Rani. There was a pedigree attached to it, and in the body of the document it was recited that the last male holder of Mankapur of the clan of Bandhalgoti was Raja Chandra Sen. He died childless, leaving a widow, Rani Bhagwani. The members of the clan desired the Rani to adopt one of them; but the Rani whose sister was married to Raja Dutt Singh, a Bisain, wished to leave the Mankapur Raj to one of the sons of her sister. Accordingly Rani Bhagwani went to Raja Dutt Singh and persuaded him to let her have his second son Azmat Singh whom she brought home and treated as her own child and left him the Raj. In the pedigree attached to P. 15 against the name of Azmat Singh are the words "Kaum Chhatri Bisain Rasnashin Bandhalgoti," i.e., "by birth a Bisain, by adoption a Bandhalgoti." Another document was P. 18, a letter dated 6th September 1870, written by Brijraj Kunwar to the Deputy Commissioner with reference to the suit brought by the Raja of Bhinga for possession of the taluq. The letter stated that "as Azmat Singh, the ancestor of Raja Pirthi Singh, was taken in adoption in another family hence he was separated from this family and became deprived of rights." This letter was filed by Achal Ram in the suit brought against him by the Raja of Bhinga. P. 13 was a copy of the pedigree filed by the Raja of Bhinga in that suit: in that pedigree under the name of Azmat Singh were the words "having been adopted succeeded to the Mankapur Raj." Its correctness was not denied by Achal Ram in that suit. P. 21, P. 25 and P. 26 were judgments of the District Judge and the Judicial Commissioners in the former suits brought against Achal Ram, P. 21 being the judgment of the Judicial Commissioners in the suit brought against Achal Ram by the Raja of Bhinga, P. 25 the judgment of the District Judge of Fyzabad in the suit of Narindar Bahadur against Achal Ram, and P. 26 the judgment of the Judicial Commissioners' Court in the same suit. The Oudh Gazetteer

and the Gonda Settlement Report were also cited in support of Azmat Singh's adoption. At page 560, Vol. I of the Oudh Gazetteer, there is the following passage concerning Dutt Singh:—

"Not content with having enlarged his own borders, his next care was to provide for the cadets of his family. His younger brother Bhawani Singh was sent to Bhinga nominally in order to defend it from its foreign enemies and put down the lawless bands of gipsies which have at different times and places cost the northern part of this district so much. His strong hand soon restored order; nor, when the service was done, did it relax its hold on the pargana. The Janwar lord died without issue; the claims of his kindred were disregarded, and Bhinga became henceforward a Bisain dependency under the rule of Bhawani Singh and his descendants. Not long after this a second son was born to Dutt Singh of whom it was prophesied at its birth that within six days he should become a Raja. His father fearing for his own life and that of his eldest son, ordered the child to be at once murdered; but before the cruel command was carried out the Raja of Mankapur most providentially died; his widow a sister of Dutt Singh's Rani adopted her infant nephew, and another Raj passed into the hands of Bisains."

In paragraph 37 of the Gonda Settlement Report Mr. Bennet stated as follows:—

"Dutt Singh, under whom the Bisain power culminated, not content with the extension of the lands under his immediate sway, forced his younger brother Bhawani Singh on the Janwar chieftainship of Bhinga, and compelled the Bandhalgoti Rani of Mankapur to adopt his younger son Azmat Singh, a stretch of the custom of adoption in favour of a member of a totally different clan, while members of the adopter's own family were in existence which is without a parallel in the range of my experience."

In Vol. II of the Oudh Gazetteer, page 458, it was stated:—

"The last of the line was Partab Singh who left no issue at his death. His wife became a *sati* with her husband and her *sati chabutra* stands in mauza Bhitaura in this pargana. Rani Bhagwani, the mother of Partab Singh, then adopted Azmat Singh, a son of Dutt Singh the Bisain Raja of Gonda, who was her sister's husband. Thus the Mankapur Raj was acquired by the Bisain family."

As to all this evidence and that produced by the defendant the Additional Civil Judge said:—

"The entry in the Oudh Gazetteer, based probably on information gathered at the time of settlement is relevant and may be some evidence in support of the alleged adoption of Azmat Singh, but it cannot be conclusive proof. That is all the evidence for the plaintiff. I may here note that it is significant that the plaintiff did not produce as a witness the present taluqdar of Mankapur, who would have been an important witness. He could have told his family history much better than Exhibit P. 15 and P. 18 of the

1904

ACHAL  
RAM  
v.  
KAZIM  
HUSAIN  
KHAN

1904

ACHAL  
RAM  
v.  
KAZIM  
HUSAIN  
KHAN.

Oudh Gazetteer. On the contrary the defendant has proved by ample evidence that Azmat Singh was not adopted though he succeeded to the Mankapur Raj. The defendant has conclusively proved that Azmat Singh could not have been adopted by the Rani of Mankapur. The defendant has produced as witnesses some members of the family of the taluqdar of Mankapur. They state that they are Bisains and shave when a death occurs in the family of the Birwa Mehnnon taluqdar. That the taluqdar of Mankapur is a Bisain is also proved by Exhibit P. 15 and the Oudh Gazetteer page 505. If there were no other evidence on the record for the defendant than that Azmat Singh and his descendants were Bisains, I would have been of opinion that Azmat Singh could not have been adopted by the Rani of Mankapur in the clan of Bandhalgoti. It is a contradiction in terms to say that Azmat Singh was adopted by a Rani of the Bandhalgotis and still remained a Bisain. A hundred and fifty years ago when the hold of religion on the people of this country was much firmer such a thing was impossible.

"I am therefore of opinion that the plaintiff has failed to prove that Azmat Singh was adopted by Rani Bhagwani. He has also failed to show that on the death of Brijraj Kunwar the succession opened up to Jubraj Singh. On the 9th issue I hold that Jubraj Singh was not the next heir after the death of Brijraj Kunwar but Jaiprakash Singh was the next heir."

On these findings the Judge dismissed the suit. An appeal from that decision to the Court of the Judicial Commissioners was heard by Mr. Blennerhassett, the Judicial Commissioner, and Mr. Ross Scott, Additional Judicial Commissioner. On the issue as to the adoption of Azmat Singh, the Judicial Commissioner found, and the Additional Judicial Commissioner concurred in the finding, that the adoption was proved and that Jubraj Singh was therefore the preferential heir to the estate on the death of Brijraj Kunwar.

After considering the contentions of both parties and the evidence adduced in support of them respectively, the Judicial Commissioner said regarding the plaintiffs' case as to the adoption—

"It is contended that these various traditions are so conflicting as to be of no value, and that neither the gazetter nor the alleged admissions by the defendants are sufficient to establish the alleged adoption.

"In my opinion the *wajib-ul-arz*, the gazetteer, the admissions by Achal Ram, and the circumstances of the case sufficiently establish the adoption.

"The *wajib-ul-arz* distinctly states that though Azmat Singh became by adoption a Bandhalgoti he remained known by his original caste Bisain. The Bandhalgoti clan being much inferior in social position to the Bisain clan, there would be many reasons for Azmat Singh retaining the name of Bisain. He might thus more readily retain an alliance with his own powerful clan. He could more readily obtain suitable matrimonial alliances. On

1904

---

ACHAL  
RAM  
v.  
KAZIM  
HUSAIN  
KHAN.

this point Saltanat Kunwar has admitted that a hitch took place in her own matrimonial negotiations on the ground that marriage with a Bandhalgoti was unsuitable. On it being ascertained that the Raja was a Bisain by race no further difficulties were raised. It is probably a fact that Raja Partab Singh's wife became a *sati*. The Mankapur Raj was probably in substance acquired by force. Policy or necessity may have dictated an adoption as the best means of enlisting the sanctions of religion and law on the side of the conqueror. Or the adoption may have been used as a means of getting rid of an inconvenient prophecy and of saving the life of the child.

"Whatever the motives, the historians all agree in stating that the adoption took place, and there seems no reason to doubt that after the death of Partab Singh his mother adopted Azmat Singh, who therefore appears in the pedigree as the son of Raja Chander Sen her husband. The Bisains having since held possession under this adoption, it must after this lapse of time be presumed to have been correctly carried out. The conquest of one Raja by another was a matter of common occurrence and was sufficient by itself to account for a change of dynasty. There was absolutely no necessity for a conqueror of high caste to lower his position by setting out his adoption into a clan of a considerably lower degree unless the adoption took place in fact. The retention of the title of Bisain would sufficiently account for other Bisains continuing to observe the ceremonies of mourning, and there is authority in support of the view that those ceremonies are observed notwithstanding an adoption.

"No member of Azmat Singh's branch has come forward to claim this estate. Had there been no adoption to bar such a claim, it might have been made. Though the daughters of Bisains are married to Bandhalgotis, no such marriage can be shown to have taken place by any descendant of Azmat Singh's. The adoption has been affirmed by several judgments of the Courts in this country. It was not necessary for their Lordships of the Privy Council to deal with this adoption in their judgments on appeal. The adoption was very prominently stated in the pedigree, Exhibit P. 13, a document admitted by the defendant, and also in the letter of Brijraj Kunwar (Exhibit P. 18) a document put forward by Achal Ram. Had there been no adoption, Achal Ram could, and should, have pleaded the *jus tertii* of members of that branch of the family as a complete defence to the Raja's suit. He did not do so. If his conduct in this matter does not amount to a direct admission, and I think there was a direct admission, it is tantamount to an admission of the fact of this adoption."

On the 3rd issue, however, the Judicial Commissioner and the Additional Judicial Commissioner differed in opinion, the former being of opinion that the sale deed of 11th August 1888 was valid in law to convey to Kazim Husain Khan one-half of the taluq; while the latter held that the deed was champertous and did not operate to convey the half share in the estate, but was only effective, if at all, as an agreement to convey after

1904

ACHAL  
RAM  
v.  
KAZIM  
HUSAIN  
KHAN.

Ardawan Singh had obtained a decree. The Judicial Commissioner observed on the third issue :—

“On the authorities already referred to, the specific English law of maintenance and champerty has not been introduced into India. The defendant, therefore, cannot directly plead that the suit is unmaintainable on the ground of champerty. I fail to see that this was other than a fair agreement on behalf of the plaintiff Raja to supply Ardawan Singh with the necessary funds.

“The Raja has no doubt laid himself open to the imputation of fraud by taking a receipt for one lac of rupees not actually paid to Ardawan Singh. It is urged for him that this receipt was taken merely to accentuate the fact that the deed was an actual deed of sale *in presenti* and not an agreement for sale. It may be doubted whether this was necessary from a conveyancer's point of view; a deed of deposit would have been more truthful, and it can undoubtedly be said that after the lapse of years the Raja might have made use of that document to defraud Ardawan Singh of the lac of rupees due to him. There is, however, no direct evidence that the Raja or his advisers did contemplate such fraud.

“It has been shown that Ardawan Singh demanded the arrears of his monthly allowance. It has not been shown that he demanded payment of the one lac of rupees after the registration of the deed. In the present suit there has been no attempt to deny that the money will be due to Ardawan Singh if the suit is finally successful. A claimant of small means wishing to sue an opponent in possession of a large estate has a difficult and doubtful task before him and he must of necessity pay somewhat highly before any reasonable man will advance him money for such a purpose. I do not think the terms in this case were extortionate or unconscionable. They are said to be the same as those accepted by Narindar Bahadur, who eventually lost his case. Ardawan Singh was clearly interested in Narindar Bahadur's suit, and there probably was an agreement between them to divide the share which either of them might succeed in obtaining. Both of these men had very substantial claims to the estate. The law is uncertain. Before the decision of their Lordships it was not easy to decide which had a superior claim. Neither of them unassisted had the means to carry the litigation through to Her Majesty in Council. If either of them succeeded in obtaining half the estate and one lac of rupees and any balance of Rs. 50,000 not spent in litigation, I am not prepared to hold on the materials before me that that would have been an extortionate and unconscionable bargain, or that this was a gambling in litigation, or that Achal Ram, who has hitherto defeated two opponents by pleading a *jus tertii*, has been injured and oppressed by any unrighteous suit. So far as the case has yet proceeded I fail to see anything contrary to public policy in the agreement between the plaintiff Raja and Ardawan Singh.

“The learned counsel for the defendant contends that this agreement is void *ab initio*. I cannot accept that contention. Agreements caused by coercion, undue influence, fraud, or misrepresentation are voidable at the option of the party whose consent to the agreement was thus brought about.



1904

---

 ACHAL  
 RAM  
 v.  
 KAZIM  
 HUSAIN  
 KHAN.

Ardawan Singh has not elected to avoid the agreement. On the contrary, for about 2½ years after the agreement he maintained that agreement and acted upon it. It appears to me that the defendant in this case is not entitled to avoid this agreement, and he cannot raise for the benefit of Ardawan Singh pleas which Ardawan Singh has not thought proper to put forward for his own benefit.

"In the case of *Manishankar Pranjivan v. Bai Muli* (1) authorities are cited in support of the rule that where an assignee sues on his assignment and proves it, an adverse party cannot take the objection that there was no consideration. The case of *Bhobosoondree Dasseah v. Issurchunder Dutt* (2) is clearly distinguishable from the present case. That was a suit in ejectment not only against Jageshar Ghosh but also against Ishwar Chander Dutt who was in possession of the property. The plaintiff had refused to perform her part of the contract and would have failed in a suit for specific performance. The case of *Rajah Mohkam Singh v. Rajah Rup Singh* (3) relied on by the defendant was a case between the parties to the agreement. The present case is not one of that character. I find on issue No. 3 that the suit is maintainable.

"I would remit the case to the Court below, under section 566 of the Code of Civil Procedure, for findings on the remaining issues with directions that no additional evidence is required."

The Additional Judicial Commissioner said :—

"I think the case of *Bhobosoondree Dasseah v. Issurchunder Dutt* (2) is authority for holding that the contract of the 11th August 1888, executed by Ardawan Singh did not operate as a present transfer of the property, but as an agreement to transfer half of so much of the estate as might be recovered in a suit to be instituted by Ardawan Singh and the plaintiff Raja. If this view is correct the plaintiff Raja's suit for possession would fail even if Ardawan Singh transferred half the taluqa, but as I have stated, all he transferred was half his rights in the estate or half the right to sue for the possession of it.

"I therefore hold that whether the contract between Ardawan Singh and the plaintiff Raja be void or voidable or a valid and binding agreement, the plaintiff Raja cannot sue for possession of half the taluqa in the present suit.

"I am also of opinion that the suit must fail as the agreement on which the plaintiff Raja now says he comes into Court is a gambling in litigation and opposed to public policy and therefore void.

"I would therefore dismiss the appeal with costs."

As there was a difference of opinion on a question of law the appeal was referred to Mr. Spankie, Additional Judicial Commissioner, under section 575 of the Civil Procedure Code. He was of opinion that there was a contract of sale between

(1) (1888) I L. R., 12 Bom., 686. (2) (1872) 11 B. L. R., 86.

(3) (1893) I. L. R., 15 All., 352; L. R., 20 I. A., 127.

1904

ACHAL  
RAM  
v.  
KAZIM  
HUSAIN  
KHAN.

Ardawan Singh and the plaintiff Raja under which there was a transfer *in presenti* to the plaintiff of a moiety of the taluq; that such contract could operate as a present transfer of the moiety to the plaintiff Raja; and that such contract was enforceable against the defendant. And he therefore agreed with the Judicial Commissioner in holding that the suit was maintainable, and that the case should be remanded for trial of the remaining issues.

The suit was therefore remanded to the District Judge of Gonda for decision of the issues still undecided.

The Judge delivered his decision on 11th April 1899. On the 1st issue he held that the suit was not barred by limitation: on the 5th issue that Pirthipal Singh was a taluqdar within the meaning of Act I of 1869: on the 6th issue that Sarfaraz Kunwar succeeded to a widow's estate of inheritance, and on the 7th and 8th issues that on the death of Brijraj Kunwar the succession opened to the next heir of Pirthipal Singh. On the 10th and 11th issues, which related to the deed alleged to have been executed by Jubraj Singh in favour of the Raja of Bhinga, dated 25th December 1872, the Judge held that the deed could not operate as a transfer of an interest in the taluq as the succession did not open until the death of Brijraj Kunwar on 23rd February 1879: on the 12th issue he decided that no custom was proved to exclude daughters from inheriting: on the 13th and 14th issues that the alleged will of Pirthipal Singh was not proved: on the 15th issue that the settlement proceedings did not confer on Sarfaraz Kunwar any larger estate than as widow of a taluqdar: on the 16th, 17th and 18th issues, which related to transfers of portions of the taluq alleged to have been made by Sarfaraz Kunwar to her daughter Brijraj, he found the deeds proved but held that they were invalid to transfer more than the life estate held by Sarfaraz Kunwar: on the 19th issue he held that the alleged adoption of Barwand Singh was not proved: on the 20th issue that Pirthipalganj was not a portion of the taluq: and on the 22nd issue that the remaining property in suit constituted the taluq-dari estate of Pirthipal Singh.

On receipt of these findings the Court of the Judicial Commissioners delivered their final judgment on 7th June 1899,

confirming on all the issues the findings arrived at by the District Judge of Gonda. In the result they reversed the judgment of the Additional Civil Judge, passed a decree for the plaintiff Raja for a half share of the taluq, and dismissed the claim to recover possession of a half share of Pirthipalganj.

There were then concurrent findings on all the issues except the 3rd and 9th, namely, as to the legal effect and validity of the deed of sale of 11th August 1888, and as to whether or not Azmat Singh was adopted.

On this appeal the 3rd issue was argued first as a preliminary point, as raising the respondent's right to sue.

Mr. *Haldane*, K. C., Mr. *W. C. Bonnerjee*, and Mr. *G. E. A. Ross* for the appellant contended that the deed of sale of 11th August 1888 was a fictitious transaction and void and of no effect against the appellant on three grounds: (1st) that the respondent had no right to sue in the absence of Ardawan: the appellant was not a party to the contract and could not get specific performance of it against Ardawan. (2nd) that a person out of possession could not give any title to property sold by him; the contract to sell therefore did not operate as a present transfer of the property, but was at most an agreement to transfer it, on the vendor's coming into possession, a condition which was never fulfilled in this case. Such an agreement did not give the respondent the right to obtain possession of the moiety of the taluq which was the subject of the deed of sale. Reference was made to *Bhobosoondree Dasseah v. Issurchunder Dutt* (1). (3rd) that the deed of sale was void as being champertous and contrary to public policy. Ardawan had no interest in the property, so could confer none by the assignment. *Tara Soon-daree Chowdhraïn v. Collector of Mymensingh* (2); *Chunder Kant Mookerjee v. Ram Coomar Koondou* (3); and on appeal *Ram Coomar Coondoo v. Chunder Canto Mookerjee* (4); and *Debi Dayal Sahoo v. Bhan Pertap Singh* (5) were referred to.

Mr. *De Gruyther* for the respondent contended that he had under the deed of sale of 11th August 1888, acquired a good title to a half share of the taluq, and therefore had a right to

- (1) (1872) 11 B. L. R., 36. (3) (1874) 13 B. L. R., 530.  
 (2) (1873) 13 B. L. R., 495. (4) (1876) L. R., 4 I. A., 23: I. L. R., 2 Calc., 233.  
 (5) (1903) I. L. R., 31 Calc., 433.

1904

ACHAL  
 RAM  
 v.  
 KAZIM  
 HUSAIN  
 KHAN.

1904

ACHAL  
RAM  
v.  
KAZIM  
HUSAIN  
KHAN.

maintain the suit. The case of *Bhobosoondree Dasseah v. Issur-chunder Dutt* (1), was based on that of *Raja Sahib Perhlad Sein v. Baboo Budhoo Sing* (2), and both those cases were distinguished in the more recent case of *Kali Das Mullick v. Kanhya Lal Pundit* (3) by the fact that "the ground of the decision in them was that the plaintiff was not entitled under the terms of the contract of sale to possession." Here the respondent was entitled to possession; and his claim was not opposed by the donor, but by a third party, the appellant. The only reasons therefore for the rule of Hindu Law making delivery of possession necessary (namely, the prevention of difficulties arising on the denial of the transaction by the donor, and the avoidance of competing claims) did not exist. Reference was made to Mayne's Hindu Law, 6th Edition, pages 494, 496. That the donor should be in possession was not absolutely necessary. If a complete title could be made without possession there was no reason why the respondent could not sue, and even if by the Hindu Law possession were necessary that law had been abrogated by the Transfer of Property Act, and the registration of the deed of sale gave the respondent a complete title. The Transfer of Property Act (IV of 1882), sections 3, 54 and 123; *Phul Chund v. Lakshu* (4); *Dharmodas Das v. Nistarini Dasi* (5); and *Bai Rambai v. Bai Mani* (6) were referred to. As to the deed of sale being void on the ground that it was contrary to public policy, the law of champerty did not apply to India. *Raghunath v. Nilkanth* (7), and *Ram Comar Coondoo v. Chunder Canto Mookerjee* (8), were cited. Nor was this a champertous agreement. *Fischer v. Kamala Naicker* (9) was referred to. The contract was not unconscionable or extortionate, and the question as to whether or not there was failure of consideration did not make the matter one of public policy.

On the conclusion of the argument for the respondent on the preliminary question their Lordship's intimated that they would hear the appellant on the whole case.

(1) (1872) 11 B. L. R., 36.

(5) (1887) I. L. R., 14 Calc., 446.

(2) (1869) 12 Moore's I. A., 275 (292,

(6) (1898) I. L. R., 23 Bom., 234.

306) : 2 B. L. R., P. C. (117, 125).

(7) (1893) I. L. R., 20 Calc., 843.

(3) (1884) L. R., 11 I. A., 219 (227, 231) : (8) (1876) L. R. 4 I. A., 23 : I. L. R., 11 Calc., 121 (131, 135).

R., 2 Calc., 233.

(4) (1903) I. L. R., 25 All., 358.

(9) (1860) 8 Moore's I. A. 170 (175),

For the appellant it was then contended that the adoption of Azmat Singh was not proved. All that was shown by the documents and authorities produced was that Azmat had succeeded to the Mankapur Raj, but not that he had been adopted. No change of "gotra" had been shown, and this was absolutely necessary for a valid adoption. Stoke's Hindu Law Books, page 564, was cited as to the meaning of the word "gotra." Azmat Singh after his alleged adoption remained a Bisain, though he had become a member of a Bandhalgoti family; he was not therefore validly adopted. As to the position and status of an absolutely adopted son, his *gotra* and *sapinda* relationship, and his impurity on deaths in the family into which he has been adopted and in his natural family, the Tagore Law Lectures for 1888 by Golap Chandra Sarkar, pages 387, 388 and the Hindu Law authorities there referred to were cited. The word "rasnishin" in the letter from Brijraj (exhibit P 18) meant "sitting in the adoptive father's seat;" that is, Azmat Singh took the Raj but was not necessarily adopted. As to the pedigree (exhibit P 13) said to have been admitted by Achal Ram, in which Azmat Singh was described as having been "adopted and succeeded to Mankapur Raj" the case of *Aumirtolall Bose v. Rajoneekant Mitter* (1) was cited to show that such an admission (by implication on the pleadings) was not tantamount to proof of the fact. Azmat Singh's adoption not having been proved, Ardawan Singh, through whom the respondent claimed, had no right to succeed to the taluq, Jai Prakash Singh, a descendant of Azmat Singh, being nearer in degree to Pirthipal Singh than Jubraj Singh the father of Ardawan. It was also contended that under the Oudh Estates Act (I of 1869) Brijraj Kunwar took an absolute estate in the taluq. Sections 2, 11, and 22 of the Act, and the case of *Brij Indar Bahadur Singh v. Rani Jankee Koer* (2) were referred to. On the death of Brijraj the estate devolved upon her husband the appellant to the exclusion of the reversionary heirs of Pirthipal Singh. The issue as to the custom excluding daughters should have been decided in favour of the

1904

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 ACHAL  
 RAM  
 v.  
 KAZIM  
 HUSAIN  
 KHAN.

(1) (1873) L. R. 2 I. A., 113 (125);      (2) (1877) L. R. 5 I. A., 1.  
 15 B. L. R., 10 (23)



1904

ACHAL  
RAM  
v.  
KAZIM  
HUSAIN  
KHAN.

appellant, and in that case the suit would be barred by limitation.

For the respondent as to the mode of devolution of the taluq were cited the cases of *Achal Ram v. Udai Partab Addiya Dat Singh* (1); *Narindar Bahadur Singh v. Achal Ram* (2); *Dewan Ran Bijai Bahadur Singh v. Rae Jagatpal Singh* (3); *Jagatpal Singh v. Jageshar Bakhsh Singh* (4); and *Sheo Partab Bahadur Singh v. Allahabad Bank* (5). Brijraj Kunwar took only the restricted estate of a Hindu female, and not an absolute estate. The elder line succeeded where there were two collaterals in the same degree. The issue as to the custom of excluding daughters had been decided by both Courts against the appellant. As to the adoption of Azmat Singh it was contended it was proved by the documentary evidence produced in support of it. Wilson's Glossary, page 438, was referred to to show that the meaning of "rashnishin" was "adopted son." The same meaning was to be given to it in the letter from Brijraj Kunwar (exhibit P 18) and in the pedigree (exhibit P 15). Bisains were superior to Bandhalgotis which would account for Azmat Singh remaining a Bisain after adoption. Brijraj Kunwar's letter (exhibit P 18) was put in by the appellant in the suit brought against him by the Raja of Bhinga. No issue as to the adoption of Azmat Singh was raised in that suit because the pedigree stating it was put in and no objection to its correctness was taken by the appellant. The production of the pedigree before any dispute existed, together with the absence of any denial of its correctness amounted to an admission of it as being correct. *Bejai Bahadur Singh v. Bhupindar Bahadur Singh* (6), was cited. No heir of Azmat had at any time advanced any claim to the taluq when the succession opened, and three inquiries had resulted in findings that the adoption had been made. There was no documentary evidence to show that the *gotra* was not changed, and the oral evidence as to that question was worthless. As to the effect of adoption on the

(1) (1888) L. R. 11 I. A., 51; I. L. R., 10 Cal. 511.

(2) (1898) L. R. 20 I. A., 77; I. L. R., 20 Cal. 649.

(3) (1890) L. R. 17 I. A., 173; I. L. R., 18 Cal. 111.

(4) (1902) L. R. 30 I. A., 27 (29); I. L. R., 25 All. 143 (150).

(5) (1903) L. R. 30 I. A., 209 (213); I. L. R., 25 All., 476 (490).

(6) (1895) L. R. 22 I. A., 139; I. L. R., 17 All., 456.

1904

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ACHAL  
RAM  
v.  
KAZIM  
HUSAIN  
KHAN.

performance of ceremonies for impurity by members of the natural family of the adopted person on the death of a member of the family into which he had been adopted reference was made to Mayne's Hindu Law, 6th Edition, page 223 ; Cowell's Tagore Law Lecture (1870), page 218 ; and Macnaghten's Hindu Law, page 69. Reference was also made to the Oudh Blue Book, Vol I, pages 76, 266, and 505 as to the History of the Mankapur Raj, and to records of former cases concerning the Raj in which the same pedigree (exhibit P. 15) had been produced in evidence.

1905, *February 9th*.—The judgment of their Lordships was delivered by LORD MACNAGHTEN :—

This is an appeal from a judgment and decree of the Court of the Judicial Commissioner of Oudh, reversing the decision of the Court below, and awarding to the respondent Raja Kazim Husain Khan possession of one-half of the taluq Birwa Mehnon.

The taluq was granted to one Pirthipal after the confiscation. It was placed in Classes 1 and 2, but not in Class 3 of Act I of 1869. The taluq, therefore, is one that devolves upon a single heir, though not descending according to the rules of lineal primogeniture.

Pirthipal died in the year 1859. He left a widow and a daughter, but no male issue. He was succeeded by his widow. She died in 1870, and then the daughter inherited the estate. Upon her death on the 23rd of February 1879, the succession opened to collaterals of Pirthipal.

The appellant Achal Ram was the husband of Pirthipal's daughter. On his wife's death he took possession. He was beset by litigation. But with the exception of a short interval following his dispossession by a claimant who succeeded in the Court of the Judicial Commissioner, but failed before this tribunal, he managed to hold sole possession against all comers until the decree now under appeal was pronounced.

The respondent Raja Kazim Husain Khan claims to be entitled to one moiety of the estate under a purchase from Ardawan Singh, who has been held to be the heir of the nearest collateral of Pirthipal living at the daughter's death.

1904

ACHAL  
RAM  
v.  
KAZIM  
HUSAIN  
KHAN.

The present suit was brought by Ardawan and the Raja suing as co-plaintiffs. Ardawan afterwards withdrew from the case. He is said to have been bought off by Achal Ram. At any rate, at his own request and on the allegation that he was satisfied his case was baseless, his name was struck off the record. Then arose the question whether the Raja could sue alone, and it was held that he could.

A great number of objections were raised by Achal Ram by way of defence. All but two are disposed of, either by decisions of this Board or by concurrent findings which the appellant is not in a position to contest. The two remaining objections are these:—In the first place it is contended that the sale to the Raja was void as being champertous and a “gambling in litigation” contrary to public policy. Then it is objected that there is a branch of the family senior to that to which Ardawan belongs, and that in it there are to be found collaterals nearer than Ardawan. This branch traces descent from a remote ancestor, Azmat Singh, the younger son of a powerful chieftain called Dutt Singh, from whose brother Ardawan is descended. The sole question on this part of the case is whether Azmat passed out of the family by adoption. On this point, as well as on the question of champerty, the Court of the Judicial Commissioner differed from the Court of first instance, which held the sale-deed void and the adoption not proved.

The sale-deed is dated 11th August 1888. In it Ardawan states his title by succession, the impossibility of recovering possession from Achal Ram without a suit, and his own inability to sue owing to want of money. “So therefore,” he goes on to say, he has sold half the estate to the Raja for a lac and a half of rupees. He acknowledges the receipt of one lac. The balance of Rs. 50,000 is to remain on deposit with the Raja to be expended in prosecuting the proposed suit and in paying a monthly stipend of Rs. 50 to himself and Rs. 20 to a mukhtar. On the termination of the litigation he is to receive the balance. In the suit the Raja and he are to act and work jointly and the Raja is given full power to conduct the litigation and manage the expenditure.

1904

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ACHAL  
RAM  
v.  
KAZIM  
HUSAIN  
KHAN.

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Now at the date of the sale-deed the position of things was this. Achal Ram was in possession. A suit to recover the estate had been brought against him by one Narendra who apparently would have been entitled as the heir of his father Harbhagat Singh if the succession had opened on the death of Pirthipal's widow. That suit had been dismissed by the Subordinate Judge on the ground of limitation. The dismissal had been affirmed by the Judicial Commissioner on a different ground and an appeal was then pending to the Privy Council. It seems that the Raja had bought one moiety of the estate from Narendra under a deed of sale framed on the same lines as Ardawan's deed while Narendra and Ardawan had come to some arrangement for dividing the estate between them in case either the one or the other should succeed against Achal Ram.

The statement in the sale-deed to the effect that one lac had been paid to Ardawan was not in accordance with the fact. Indeed it seems inconsistent with the scope of the deed. It is hardly conceivable that anybody in the position of the Raja would pay down without any security so large a sum to a man confessedly without means. And besides it is obvious that if it had been intended that Ardawan should receive a lac of rupees at once, there would have been no occasion to provide a monthly allowance for his "personal expenses." Probably the statement was introduced by the draftsman under the notion that it might impart some additional solemnity to the instrument. Of course, at the first blush, the untrue statement throws suspicion upon the whole transaction. But after all, so long as the deed stands, it is no concern of Achal Ram's that Ardawan may have a grievance on the score of a misstatement in an instrument to which Achal Ram is no party. Ardawan himself has taken no steps to impeach the deed. On the contrary, in the course of the two years that elapsed between the date of the deed and the institution of the suit (which was delayed as long as possible in order to await the result of Narendra's appeal) Ardawan more than once affirmed the transaction, claiming and receiving his monthly allowance under the deed and urging the Raja's agent to

1904

ACHAL

RAM

v.

KAZIM

HUSAIN

KHAN.

commence proceedings without delay. It is not enough for Achal Ram to make out that the sale-deed is voidable at the option of Ardawan. He must show that it was and is absolutely void. But now Achal Ram is in this further difficulty, that, according to Ardawan's petition of compromise which he puts forward as part of his case, Ardawan has nothing to complain of, for he had nothing to sell. It may be added that the Raja did all in his power to procure the attendance of Ardawan at the trial, but he was kept out of the way.

Apart from the untrue recital in the sale-deed there seems to be no flaw in the transaction. Without assistance Ardawan could not have prosecuted his claim. There was nothing extortionate or unreasonable in the terms of the bargain. There was no gambling in litigation. There was nothing contrary to public policy. Their Lordships agree with the judgment of the Court of the Judicial Commissioner that the transaction was a present transfer by Ardawan of one moiety of his interest in the estate, giving a good title to the Raja on which it was competent for him to sue.

The question of Azmat's adoption is not quite so simple a matter. The adoption, if it took place, occurred before the year 1681 A.D., when Azmat succeeded to the Mankapur Raj. At this distance of time it is of course impossible to prove that all the requisite ceremonies were duly and regularly performed. On the one hand, it is not disputed that Azmat and his descendants, successors in the Raj, remained Bisains, though the adoption, if it took place, was an adoption into the Bandhalgoti clan, a clan much inferior in social position to the Bisains. It appears that on the death of a member of the Mankapur family, the ceremonies usual on the death of a relative are observed among the Bisains of Birwa Mehnon, a circumstance unusual in the case of an adoption out of the family, though, it is said, not unprecedented.

On the other hand, there is a body of tradition strong and persistent in favour of the adoption, and there is a story still current which may possibly serve to throw some light on the transaction. It is said that on Azmat's birth there was a prophecy put about to the effect that the child would become



a Raja within eight days. His father, Dutt Singh, alarmed for the safety of himself and his eldest son, contemplated removing the danger in a summary manner, but a better way was found of defeating or fulfilling the prophecy. The Rani of Mankapur, a sister of Dutt Singh's wife, whose son, Partab Singh, the last of his line, had recently died without issue, leaving a wife who became a *satti* with her husband, out of affection for her nephew or her nephew's mother or through fear of her powerful neighbour, was ready to adopt the child to succeed her in the Raj of Mankapur.

The tradition of the adoption is preserved in the *wajib-ul-arz* of mauza Ashrafpur, Pargana Mankapur, and is to be found recorded in the Oudh Gazetteer and the Gonda Settlement Report.

It is to be observed that in no previous litigation did Achal Ram ever suggest that collaterals nearer in degree were to be found in Azmat's line. On the contrary, he filed evidence tending to show Azmat's adoption. It is still more significant that no claim to the Taluk Birwa Mehnun has ever been set up by any member of the Mankapur family.

On the whole their Lordships see no reason to differ from the conclusion at which the Court of the Judicial Commissioner has arrived. It seems to them that the evidence in favour of adoption preponderates.

Their Lordships, therefore, will humbly advise His Majesty that the appeal should be dismissed.

The appellant will pay the costs of the appeal.

*Appeal dismissed.*

Solicitors for the appellant.—Messrs. *T. L. Wilson and Co.*

Solicitor for the respondent.—Mr. *R. T. Tasker.*

J. V. W.

1904 ?

ACHAL  
RAM  
"KAZIM  
HUSAIN  
KHAN.

1904  
August 11.

## REVISIONAL CRIMINAL.

*Before Mr. Justice Knox.*

EMPEROR v. SHIB SINGH.\*

*Criminal Procedure Code, section 195—Sanction to prosecute—Sanction to prosecute given by the District Magistrate as head of the Police—Revision—Act No. V. of 1861 (Police Act), section 4(2).*

*Held* that the High Court has no power to interfere in revision where a District Magistrate has granted sanction for a prosecution under section 195 of the Criminal Procedure Code acting therein as head of the Police of the district. *Ramasory Lall v. Queen-Empress* (1) dissented from.

ONE Shib Singh was alleged to have made a false report to the Police at Bhongaon in the Mainpuri district. Application was thereupon made to the District Magistrate as head of the Police in the district for sanction to prosecute Shib Singh under section 182 of the Indian Penal Code. The District Magistrate granted sanction as prayed. Shib Singh applied to the Sessions Judge in revision to set aside the order of the District Magistrate. But the Sessions Judge dismissed the application under the following order:—

“This is an application to set aside a sanction granted by the District Magistrate for the prosecution of the applicant under section 182 of the Indian Penal Code. The Magistrate acted as head of the Police, and in my opinion no revision lies to this Court. Further, no reason is shown to me to interfere.

“It was argued that as the Deputy Magistrate who tried the applicant's complaint ordered the applicant to pay compensation, the applicant has already been satisfactorily punished. I do not see what the order for compensation has to do with the offence committed by the applicant with respect to the Police.

“I dismiss this application.”

Shib Singh then applied in revision to the High Court relying on the ruling of the Calcutta High Court in *Ramasory Lall v. Queen-Empress* (1).

Pandit *Tej Bahadur Sapru*, for the applicant.

The Assistant Government Advocate (*Mr. W. K. Porter*), for the Crown.

KNOX, J.—The view taken by the learned Sessions Judge is in my opinion sound. The applicant relies upon *Ramasory*

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\* Criminal Revision No. 405 of 1904.

(1) (1900) I. L. R., 27 Calc., 452,

*Lall v. Queen-Empress* (1), but it appears to me, with every respect to the learned Judges who decided that case, that they overlooked the provisions of section 4, paragraph (2) of Act No. V of 1861. I dismiss the application.

1904

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EMPEROR  
v.  
SHIB  
SINGH.

*Before Mr. Justice Banerji.*

EMPEROR v. BALWANT.\*

1904

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August 17.

*Criminal Procedure Code, sections 110 and 118—Security for good behaviour—*

*Delegation of inquiry into sufficiency of security.*

*Held* that it is not competent to a Magistrate who has passed an order under section 118 of the Code of Criminal Procedure to delegate to another officer the duty of inquiring into the sufficiency of the security tendered, but such inquiry must be made by the Court by which the original order was passed. *Queen-Empress v. Pirthipal Singh* (2) and *Emperor v. Tota* (3) followed.

In this case one Balwant was called upon by a Magistrate of the first class under section 110 of the Code of Criminal Procedure to find security for good behaviour. In obedience to that order Balwant tendered two sureties, but they were rejected by the Magistrate on the strength of reports furnished by the Tahsildar and the local police. Balwant applied in revision to the Sessions Judge against the order refusing to accept his sureties on the ground that the Magistrate had no authority to delegate the duty of inquiring into their sufficiency to any other officer, but was bound to make such inquiry himself. This contention was accepted by the Sessions Judge, who accordingly referred the case to the High Court under the provisions of section 433 of the Code of Criminal Procedure.

The following order was passed:—

BANERJI, J.—Balwant was ordered by a Magistrate to furnish security for good behaviour. He tendered two sureties, both of whom have been rejected by the Magistrate upon the ground that the Tahsildar and the police reported against the character of the sureties. The learned Sessions Judge has referred this case under section 433 of the Code of Criminal Procedure with the recommendation that the Magistrate's order

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\*Criminal reference No. 437 of 1904.

(1) (1900) I. L. R., 27 Calc., 452. (2) Weekly Notes, 1898, p. 154.

(3) (1903) I. L. R., 25 All., 272.

1904

EMPEROR  
v.  
BALWANT.

be set aside. The case clearly falls within the ruling in *Queen-Empress v. Pirthipal Singh* (1) followed in *Emperor v. Tota* (2). In those cases it was held that the Magistrate must satisfy himself by legal methods as to the sufficiency of the security tendered by the person against whom an order under sections 110 and 118 of the Code of Criminal Procedure has been made, and that he cannot delegate his functions in this respect to a subordinate, and cannot decide the question of the surety being a fit and proper person upon a report furnished by another person. In this case the Magistrate himself did not take any evidence as to the sureties tendered being proper persons or not. He justifies his action by referring to an order issued by the District Magistrate upon the 7th April 1902. If the District Magistrate has issued any such order, it is in the teeth of the rulings to which I have referred above, and the District Magistrate should consider the desirability of withdrawing such order. The action of the Magistrate in this case is contrary to law. I therefore set aside his order, and direct that he do dispose of the matter in accordance with law.

1904  
August 29.

*Before Mr. Justice Banerji.*

EMPEROR v. AZIZ-UD-DIN.\*

*Act No. XLV of 1860 (Indian Penal Code), section 170—Personating a public servant—Definition.*

*Held* that to constitute the offence provided for by section 170 of the Indian Penal Code it is not necessary that the act done or attempted to be done should be such an act as might legally be done by the public servant personated. *Queen-Empress v. Wazir Jan* (3) referred to.

THE applicant, Aziz-ud-din, came one day from Saharanpur to Muzaffarnagar without a ticket, and was arrested in the act of demanding one anna's worth of fruit from a fruit-seller for one pice on the ground that he was a head constable. He was tried by a Magistrate of the first class for an offence under section 170 of the Indian Penal Code, and, being convicted, was sentenced to two years' rigorous imprisonment and a fine of

\* Criminal Revision No. 466 of 1904.

(1) Weekly Notes, 1898, p. 154. (2) (1903) I. L. R., 25 All., 272,  
(3) (1887) I. L. R., 10 All. 58.

annas 13-6 (this being the amount which he should have paid for his ticket). Aziz-ud-din appealed to the Sessions Judge, before whom it was contended that the conviction under section 170 was illegal because the act which the appellant did, or attempted to do, was not one which, if he had really been a head constable, he could legally have done. The Sessions Judge, however, with reference to the ruling of the High Court in *The Queen-Empress v. Wazir Jan* (1), did not accept this argument, and confirmed the conviction and sentence. Aziz-ud-din thereupon applied in revision to the High Court.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Satya Chandra Mukerji*), for the applicant.

The Assistant Government Advocate (for whom Maulvi *Muhammad Ishaq*), for the Crown.

BANERJI, J.—The applicant Aziz-ud-din has been convicted of the offence punishable under section 170, Indian Penal Code, and sentenced to two years' rigorous imprisonment and a small fine. The facts found are these:—

The applicant came by train from Saharanpur to Muzaffarnagar without a ticket, and was arrested when he was demanding one anna's worth of fruit from a fruit-seller for one pice on the representation that he was a head constable, which in fact he was not. For this he has been convicted under section 170 of the Indian Penal Code. It is contended on his behalf that this was not a case which would fall within the purview of that section. I am unable to agree with this contention. There can be no doubt that the applicant pretended to hold a particular office as a public servant, namely, the office of head constable, knowing that he did not hold such office, and that in such assumed character he attempted to do an act under colour of such office. It is not in my opinion necessary for the application of the section that the act done under colour of office should be a legal act on the part of the accused. If he pretended to be a Police officer and as such Police officer tried to extort money or things from a fruit-seller, I think the offence under section 170 was committed. This view is supported by the ruling of this Court in *Queen-Empress v.*

1904 -

EMPEROR..

v.

AZIZ-UD-

DIN..



1904

EMPEROR  
v.  
AZIZ-UD-  
DIN.

*Wazir Jan* (1). The conviction under section 170 was in my opinion a proper one. But the imposition of the extreme penalty provided by the section seems to be uncalled for. I think the ends of justice will be sufficiently met if the sentence be reduced to that of one year's rigorous imprisonment, to run from the date of the conviction, the fine being maintained. I order accordingly, and to this extent allow the application.

1904

October 6.

*Before Mr. Justice Banerji.*

IN THE MATTER OF THE PETITION OF T. A. MARTIN.\*

*Criminal Procedure Code, section 145(1)—Revision—Jurisdiction to interfere with an order purporting to be passed under section 145.*

Where an order purporting to be passed under section 145(1) of the Code of Criminal Procedure after evidence recorded which satisfied the Magistrate that there existed a dispute likely to occasion a breach of the peace in respect of certain immovable property was found to be insufficient or defective in the sense that it gave no information as to the subject of the dispute and left the persons to whom it was issued quite in the dark as to the property in regard to which they had to set forth their respective claims, it was *held* that the inadequacy of such order gave the High Court jurisdiction to interfere. *Moresh Sengar v. Narain Bag* (2) and *Sukru Dosadh v. Ram Pergash Singh* (3) followed.

THE petitioner in this case and his sister were tenants of a house in Mussoorie, owned by a Mr. Willcocks, the premises adjoining which belonged to a church. Disputes having arisen concerning the proper boundary between Mr. Willcocks' house and the church property, one Mrs. Donald, alleging herself to be trustee of the church property, presented an application in the Court of the Deputy Magistrate at Mussoorie setting forth the existence of a dispute as to the boundary between the church compound and that of Mr. Willcocks' house, and stating that in consequence thereof there was likely to be a breach of the peace. On this the Magistrate, after recording the evidence on oath of Mrs. Donald and the church chaukidar, made the following order:—"From the evidence before me I conclude

\*Miscellaneous No. 154 of 1904.

(1) (1887) I. L. R., 10 All., 58. (2) (1900) I. L. R., 27 Calc., 981.

(3) (1902) I. L. R., 30 Calc., 443.

1904

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IN THE  
MATTER  
OF THE  
PETITION  
OF T. A.  
MARTIN.

that there is an apprehension that the peace will be broken. I therefore direct under section 145, C. C. P., that notices be served upon Mr. Martin, Miss Martin and Mr. Willcocks to appear in this Court on the 5th of August in person or be represented by pleader in order to file written statements of their claims to the land in dispute." Notices were accordingly issued in terms of the Magistrate's order above set forth. Mr. Martin thereupon applied in revision to the High Court on the ground that the notice served on him did not comply with the provisions of section 145 of the Code of Criminal Procedure, and that therefore the Magistrate was acting "entirely without jurisdiction."

Mr. *W. Wallach*, for the applicant.

The Assistant Government Advocate (*Mr. W. K. Porter*), for the Crown.

BANERJI, J.—This is an application praying for the revocation of an order passed under sub-section (1) of section 145 of the Code of Criminal Procedure on the ground that the order does not comply with the requirements of the sub-section, and has consequently been passed without jurisdiction. There is a prayer in the alternative that the case may be transferred from the Court of the Magistrate in which it is pending to some other Court. It appears that one Mrs. Donald filed an application in the Court of the Deputy Magistrate of Mussoorie stating that there was likelihood of a breach of the peace in consequence of some disputes concerning the boundary between two plots of land. Thereupon the Magistrate, after recording some evidence, passed an order in the following terms:—"From the evidence before me I conclude that there is an apprehension that the peace will be broken. I therefore direct under section 145 of the Code of Criminal Procedure that notices be served upon Mr. Martin, Miss Martin and Mr. Willcocks to appear in this Court on the 5th of August in person or be represented by pleader in order to file written statements of their claims to the land in dispute." There can be no doubt that this order is not in compliance with the provision of sub-section (1), section 145. It gives no information as to the subject of the dispute, and it leaves the persons to whom notice is ordered

1904

IN THE  
MATTER  
OF THE  
PETITION  
OF T. A.  
MARTIN.

to be issued quite in the dark as to the property in regard to which they have to set forth their respective claims. It has been repeatedly held both in this Court and in other Courts that an order passed under section 145 must be in strict compliance with the provisions of that section. As the Calcutta High Court observed in *Mahesh Sowar v. Narain Bag* (1), the written order should be correct and complete in its terms. The order passed in this case was wholly incomplete, and consequently failed to comply with the requirements of the law. Upon this point I may also refer to the case of *Sukru Dosadh v. Ram Pergush Singh* (2) and the Criminal Reference No. 189 of 1903 decided by the Chief Justice of this Court on the 5th of June 1903. The order complained of not being in compliance with the provisions of section 145, I set it aside.

1904  
October 11.

*Before Mr. Justice Banerji.*

EMPEROR v. BAZID AND OTHERS.\*

*Act No. XLV of 1860 (Indian Penal Code), section 441—Criminal trespass—Definition—Occupation by zamindars of house left by deceased tenant.*

A tenant of village S, who owned a house there but was temporarily residing in a neighbouring village, died, and on his death the zamindars of S took possession of the house in S adversely to the tenant's widow, alleging that they were entitled to it. *Held* that the action of the zamindars could not be taken as amounting to criminal trespass within the meaning of section 441 of the Indian Penal Code. *Emperor v. Jangi Singh* (2) referred to.

THE facts of this case are as follows :—

One Ram Sarup was the tenant of Bazid and others, zamindars of mauza Sawal, and as such tenant possessed a house in the village. He, however, for some years past had resided with his wife's family in another village, leaving the house in Sawal shut up, but looked after by some of his relatives. Ram Sarup died of plague in Pulahru in February 1904, and thereupon the zamindars of Sawal took possession of the house there, asserting their right to do so as zamindars. Ram Sarup's widow Musammat Durgia subsequently returned to Sawal and

\* Criminal Reference No. 654 of 1904.

(1) (1902) I. L. R., 27 Calc., 981. (2) (1902) I. L. R., 30 Calc., 443.  
(3) (1903) I. L. R., 26 All., 194.

1904

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EMPEROR  
v.  
BAZID.

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instituted criminal proceedings against the zamindars, who were convicted by a Magistrate under section 448 of the Indian Penal Code, and this conviction was affirmed in appeal by the District Magistrate. The zamindars applied in revision to the Sessions Judge, who, being of opinion that the conviction was not sound, reported the case to the High Court for orders under section 438 of the Code of Criminal Procedure.

The following order was passed :—

BANERJI, J.—I agree with the learned Sessions Judge who has referred this case that the offence punishable under section 448 of the Indian Penal Code has not been committed by the accused. The facts found are these. The accused are zamindars of the village Sawal. One Ram Sarup was their tenant and occupied a house in the village. For some time before his death he resided in another village, leaving the house in Sawal shut up, but looked after by some of his relatives. He died of plague in February last, and thereupon the accused zamindars of Sawal took possession of the house on the ground that they were entitled to do so. Ram Sarup's widow returned to Sawal some time after the death of her husband, and, finding the house in the possession of the accused, instituted criminal proceedings against them. The Court of first instance convicted them, and this conviction has been affirmed by the District Magistrate. As the learned Sessions Judge points out, this case is very similar to that of *Emperor v. Jangi Singh* (1). The accused did not enter into possession of the house with intent to commit an offence, or to intimidate, insult or annoy any person in possession of such property. They asserted a right to it, and, whether they were right or wrong in doing so, it is manifest that they had no intention to commit an offence or to intimidate, insult or annoy anyone. The conviction and sentence are set aside. The fine, if paid, will be refunded.

(1) (1903) I. L. R., 28 All., 194.

1904  
October 11.

*Before Mr. Justice Banerji.*

EMPEROR v. RAMESHAR AND OTHERS.\*

*Act No. XLV of 1860 (Indian Penal Code), section 434—Boundary marks fixed by authority of public servant—Definition—Criminal Procedure Code, section 145.*

A Magistrate making an order under section 145 has no authority to cause the property which is subject of a dispute likely to occasion a breach of the peace to be demarcated by boundary pillars and, consequently, if he does so, a person destroying or removing such boundary pillars is not liable to conviction under section 434 of the Indian Penal Code.

IN this case a dispute took place between the applicants and others concerning the possession of a ghat, which gave rise to proceedings under section 145 of the Code of Criminal Procedure. Upon the application of the opposite party in these proceedings the Magistrate (Joint Magistrate of Benares) ordered boundary marks to be set up demarcating the limits of the property to which his order under section 145 related, and this order was carried out by a kanungo. Rameshar and others destroyed the boundary marks so erected, and were in consequence convicted under section 434 of the Indian Penal Code and fined Rs. 50 each. They applied in revision to the Sessions Judge, who, being of opinion that the words in section 434 "authority of a public servant" meant "lawful authority," and that a Magistrate trying a matter under section 145 of the Code of Criminal Procedure had no "lawful authority" to order such boundary marks to be erected, reported the case to the High Court under section 438 of the Code, with the recommendation that the convictions and sentences of the applicants should be set aside.

The following order was passed :—

BANERJI, J.—This case has been referred by the learned Sessions Judge of Benares with the recommendation that the conviction of the accused under section 434 of the Indian Penal Code be set aside. It appears that there was a dispute between the accused and some other persons as to the possession of a ghat, and proceedings were held under section 145 of the Code of Criminal Procedure. The Joint Magistrate before whom the proceedings were held made an order under that section

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\* Criminal Reference No. 646 of 1904.



1904

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EMPEROR  
v.  
RAMESHAR.

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declaring one of the parties to be entitled to possession until evicted in due course of law, but he also ordered boundary marks to be laid down defining the limits of the possession of the respective parties. These boundary marks having been removed by the accused, they have been convicted by the Joint Magistrate under section 434 of the Indian Penal Code. I fully agree with the learned Sessions Judge that the authority of a public servant referred to in that section must be understood to mean the lawful authority of a public servant. We have therefore to determine whether the Joint Magistrate in ordering the boundary marks to be laid down acted in pursuance of law. Section 145 of the Code of Criminal Procedure did not authorize him to order boundary marks to be erected. The only order which under sub-section (6) of that section he was competent to pass was an order declaring one of the parties to the proceedings to be entitled to possession of the subject of dispute until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction. The section does not empower the Court to put any party into possession or to lay down the boundary marks of the property, the subject of dispute. The learned Joint Magistrate in his explanation says that section 517 of the Code of Criminal Procedure authorized him to make an order for the erection of boundary marks. It is manifest that that section has no application. It authorizes a Criminal Court to make an order for the disposal of any property or document produced before it or regarding which any offence appears to have been committed or which has been used for the commission of any offence. The property in question was not in the custody of the Court, nor is it property regarding which any offence was committed. The mere fact that section 145 authorizes the Court to attach the property in case of emergency does not empower the Court to make any order for laying down boundary marks. It is also clear that the Joint Magistrate did not purport to act under the provisions of the Land Revenue Act. Further, as the learned Sessions Judge points out, he was not an officer in charge of a sub-division appointed under section 18 of Act No. III of 1901. As for the above reasons

1904

EMPEROR  
v.  
RAMESHAR.

the boundary marks in question were not erected under the lawful authority of a public servant, the accused were not guilty of the offence punishable under section 434 of the Indian Penal Code. I accordingly set aside the conviction and sentence and direct that the fine imposed, if paid, be refunded.

1904  
October 26.

*Before Mr. Justice Banerji.*

GENDAN LAL (APPLICANT) v. ABDUL AZIZ KHAN  
(OPPOSITE PARTY).\*

*Act No. XLV of 1860 (Indian Penal Code), sections 417, 420—Cheating—Definition—Pre-emption—Failure to disclose existence of mortgage subsequent to purchase.*

The vendee defendant in a suit for pre-emption compromised the suit, the plaintiff agreeing to pay a certain sum in cash and to discharge certain incumbrances on the property in suit. It was subsequently discovered that the vendee had, after his purchase but before suit, mortgaged the property which was the subject of the suit for pre-emption.

*Held* that the vendee could not, on account merely of his omission to disclose the existence of this subsequent mortgage, be held guilty of the offence of cheating.

IN this case one Dabir Khan sold certain property to Abdul Aziz Khan on the 25th of February 1903. The amount of the consideration stated in the sale deed was Rs. 2,750. In respect of this sale a suit for pre-emption was brought by one Dwarka Prasad, the plaintiff alleging that the actual consideration was Rs. 1,525 only. The defendant vendee on the other hand maintained that the true consideration was that entered in the sale deed. This suit was compromised and a decree was passed in accordance with the compromise. The compromise was to the effect that the plaintiff should get a decree for pre-emption on paying to the vendee Rs. 1,575 in cash. The rest of the consideration was withheld for the payment of a prior mortgage and a charge which existed on the property at the date of the sale. Subsequently Dwarka Prasad and his brother Gendan Lal, who are members of a joint Hindu family, discovered that Abdul Aziz Khan had, on the 28th of August 1903, that is, before the institution of the suit for pre-emption,

\* Criminal Revision No. 622 of 1904.

1904

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GENDAN  
LAL  
v.  
ABDUL  
AZIZ KHAN.

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mortgaged the property bought by him to one Chhange Lal. A complaint was thereupon filed by Gendan Lal charging Abdul Aziz Khan with the offence of cheating. The Magistrate who tried the case being of opinion that the facts disclosed did not constitute the offence of cheating discharged Abdul Aziz Khan in respect of offences under sections 417 and 420 of the Indian Penal Code, the offences alleged against him. This order was affirmed by the Sessions Judge, and Gendan Lal thereupon applied to the High Court asking for a revision of these orders and for an order directing a charge to be framed and the case to be tried.

Babu *Satya Chandra Mukerji* and *Munshi Gulzari Lal*, for the applicant.

Mr. C. Ross *Alston*, for the opposite party.

BANERJI, J.—The facts out of which this application has arisen are these. One Dabir Khan sold certain property to Abdul Aziz Khan on the 25th of February 1903. The amount of consideration for the sale mentioned in the sale-deed was Rs. 2,750. Dwarka Prasad, the brother of the applicant, Gendan Lal, brought a suit for pre-emption in respect of the sale, and in that suit he stated that the actual amount of consideration was Rs. 1,525. In answer to the claim the vendee Abdul Aziz Khan contended, among other things, that the real consideration for the sale was the amount specified in the sale deed. The case ended in a compromise, and a decree was made in accordance with it. The compromise was to the effect that the plaintiff was to get a decree for pre-emption, he having paid to the vendee Rs. 1,575 in cash and the balance having been withheld for the payment of a prior mortgage and a charge which existed on the property at the date of the sale. Subsequently Gendan Lal and his brother Dwarka Prasad, who are members of a joint Hindu family, discovered that Abdul Aziz Khan had, on the 28th of August 1903, that is, before the institution of the suit for pre-emption, mortgaged the property bought by him to one Chhange Lal. Thereupon Gendan Lal brought the present complaint charging Abdul Aziz Khan with the offence of cheating. The Magistrate who tried the case, being of opinion that the facts disclosed did not constitute the offence of

1904

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GENDAN  
LAL  
v.  
ABDUL  
AZIZ KHAN.

cheating, discharged Abdul Aziz Khan of offences under sections 417 and 420 of the Indian Penal Code, the offences with which he had been charged. This order has been affirmed by the learned Sessions Judge and the present application has been made by Gendan Lal for revision of these orders and for an order directing a charge to be framed and the case to be tried.

I am of opinion that upon the facts disclosed, no case of cheating was made out. It has not been found, nor has it been proved, that Gendan Lal would not have consented to pay the amount of consideration which he did pay had he been aware that the vendee, Abdul Aziz Khan, had created a charge upon the property subsequently to his purchase. There was no obligation upon Abdul Aziz Khan to disclose the fact of the existence of that mortgage. It is conceded that for the purposes of the pre-emption suit, the existence of the mortgage made subsequently to the sale was immaterial. It is doubtful whether that mortgage, which was a mortgage of a defeasible interest in the property, can be enforced against the pre-emptor. But apart from that question, unless it can be shown that Abdul Aziz Khan by dishonest concealment of facts deceived Gendan Lal and fraudulently or dishonestly caused him to pay Rs. 1,575 he cannot be held to have cheated Gendan Lal. In the suit for pre-emption Abdul Aziz Khan was not under an obligation of the same nature as that which would have existed had he effected a sale of the property to Gendan Lal or his brother. What he did was to consent to a decree for pre-emption and to the substitution of Gendan Lal's brother for himself as the purchaser of the property. There being no obligation upon him to disclose the fact of a subsequent mortgage by himself, it cannot be said that he deceived Gendan Lal or his brother by not disclosing to them the existence of that mortgage. The learned Magistrate was therefore right in discharging the accused, and this application must be and it hereby is dismissed.

## APPELLATE CIVIL.

1904  
November 13.*Before Mr. Justice Burkitt and Mr. Justice Aikman.*

GANGA BAKHSH AND OTHERS (DEFENDANTS) v. JAGANNATH

AND OTHERS (PLAINTIFFS).\*

*Act No. III of 1877 (Indian Registration Act), section 17—Mortgage—Release of part of mortgaged property on part payment of mortgage debt effected by endorsement on bond—Registration.*

A portion of certain property, the subject of a mortgage, was purchased by a stranger to the bond, who paid off a portion of the mortgage debt, and on the bond the fact of payment together with the release of a specified portion of the mortgaged property was endorsed. *Held* that such an endorsement did not require registration. *Gurdial Mal v. Jauhari Mal* (1) followed.

THIS was a suit for sale on a mortgage for Rs. 2,300 executed on the 21st of January 1869, by Chunni, Horam and Nirpat in favour of Kunji Mal and Dal Chand. The plaintiffs Jagannath and others were purchasers of the bond, and they claimed to recover a sum of Rs. 5,500 on account of principal and interest. Amongst the defendants were the representatives of one Mohar Singh. Mohar Singh had purchased the share of Horam in the mortgaged property for Rs. 1,500, out of which Rs. 1,150 were said to have been left with the vendor for payment to the mortgagees, and were found to have been so paid on the 28th of August 1872. When the bond of the 21st of January 1869 was put in in the present suit it was found to bear the following endorsement:—"Received Rs. 1,870 from Mohar Singh, son of Kishan, caste Jat, resident of Kota Har-nathpur, in lieu of 1 biswa 4 biswansis. The remaining amount is due by other vendees. There is no longer any claim against Mohar Singh aforesaid." The plaintiffs took exception to the genuineness of this endorsement, but produced no evidence in support of this plea. The defendants, representatives of Mohar Singh, on the other hand, relying upon this endorsement, asked to be exempted from the plaintiffs' claim. The Court of first instance (Subordinate Judge of Meerut) found that the endorsement was genuine, but held that effect could not be given to it for want of registration. The Court found that sums amounting

\*First Appeal No. 245 of 1902 from a decree of A. Rahman, Esq., Subordinate Judge of Meerut, dated the 4th of July 1902.

(1) (1884) I. L. R., 7 All., 820.



1904

GANGA  
BAKSHI  
v.  
JAGANNATHI.

to Rs. 2,550 had been paid in part satisfaction of the mortgage debt, and that these included the sum of Rs. 1,870 endorsed on the bond as having been paid by Mohar Singh, and he passed a decree for the balance of the debt. The defendants, representatives of Mohar Singh, and other defendants appealed to the High Court.

Pandit *Moti Lal*, for the defendants.

Pandit *Sundar Lal*, Pandit *Baldeo Ram* and Babu *D. N. Ohdedar*, for the respondents.

BURKITT and AIKMAN, JJ.—This appeal arises out of a suit for sale on a mortgage for Rs. 2,300 which was executed on the 21st of January 1869 by Chunni, Horam and Nirpat in favour of Kunji Mal and Dal Chand. The plaintiffs have purchased this bond, and bring a suit against the transferees of the property to recover a sum of Rs. 5,500 on account of the principal and interest. The bond when put in by the plaintiffs was found to bear the following endorsement: "Received Rs. 1,870 from Mohar Singh, son of Kishan, caste Jat, resident of Kota Harnathpur, in lieu of 1 biswa 4 biswansis. The remaining amount is due by other vendees. There is no longer any claim against Mohar Singh aforesaid." With reference to this endorsement the plaintiffs say in their plaint that the sum of Rs. 1,870 was received on the 22nd of November 1878, but that it "appears that the endorsement had been made contrary to the intention of the creditors in collusion with the patwari." It has to be remembered that the plaintiffs had no interest in the bond at the time the endorsement was made. The bond bore the endorsement when the plaintiffs purchased it. It does not appear what ground the plaintiffs had for saying that the endorsement was not a genuine endorsement. Anyhow no evidence was called by the plaintiffs to prove the collusion alleged in the plaint. On the strength of this endorsement the representatives of Mohar Singh, the purchaser of a portion of the mortgaged property, ask to be exempted from the plaintiff's claim. In regard to this the learned Subordinate Judge says:—"The endorsement on the reverse of the bond, the correctness of which is admitted by the plaintiffs, most distinctly shows that Mohar Singh's share was exempted. But

1904

GANGA  
BAKHSHIv.  
JAGANNATH.

according to law such an endorsement cannot have any effect as regards immovables, unless it is registered. I therefore hold that Mohar Singh's share must also be held liable for the balance of the debt." In appeal here it is urged that the decision of the Subordinate Judge on this question is erroneous and reference is made to a decision of this Court, *i.e.*, *Gurdial Mal v. Jauhari Mal* (1). That decision, which we are bound to follow, was in a case similar to the present, and entirely supports the appellant's contention. According to that case the endorsement did not require registration. We sustain the appellant's plea and hold that the suit as against the representatives of Mohar Singh must fail, and as against them we dismiss it with costs here and in the Court below.

The next plea urged is as to the amount which had been paid under the bond. The lower Court finds that the payment of these items, Rs. 1,150, Rs. 400 and Rs. 1,000 has been proved. As to the item of Rs. 1,870 which the plaintiffs admit to have been paid on the 22nd of November 1878, the Court holds that this item is included in the three items mentioned above. We find it impossible to accept this conclusion. The learned Subordinate Judge apparently omits to notice that the three items referred to were paid in 1872, upwards of six years before the payment of Rs. 1,870 admitted by the plaintiffs. In his judgment the learned Subordinate Judge also assumes that all three payments were made by Mohar Singh, whereas the receipts filed show that only one payment of Rs. 1,150 was made by him; and, moreover, that payment was made by him out of the purchase money left in his hands by his vendor. Although in the grounds of appeal the plea is taken that the whole of the mortgage had been paid off, the learned vakil did not urge this ground. As to this item of Rs. 1,870 we allow the appeal, and to this extent we modify the decree of the lower Court by finding that in addition to the sums, payment of which is found proved by the Subordinate Judge, a further sum of Rs. 1,870 was paid on the 22nd of November 1878, as admitted by the plaintiffs, and the defendants other than the representatives of Mohar Singh will get credit for that amount. The

1904

GANGA  
BAKSH  
v.  
JAGANNATH.

office of this Court will prepare a fresh decree giving credit for this item. We extend the time for payment of the amount of the amended decree to the 1st of March 1905. The appellants other than the representatives of Mohar Singh will receive and pay costs in proportion to their success and failure.

The objection filed by the respondents under section 561 of the Code of Civil Procedure is dismissed with costs.

*Decree modified.*

1904

November 4.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*

KIRAT AND ANOTHER (PLAINTIFFS) v. DEBI SINGH AND OTHERS  
(DEFENDANTS).\*

*Mortgage—Prior and subsequent incumbrances—Rights of puisne mortgagees paying off a prior mortgage.*

On the 2nd of June 1863 Bikram mortgaged certain property by way of simple mortgage to Narain Singh. On the 17th of June 1873 Rup Singh, one of the sons of Bikram, made a usufructuary mortgage of the property in favour of Tula Ram and Cheda Lal. In 1879 Narain Singh obtained a decree on his mortgage, to which, however, the second mortgagees were not parties, and the property was brought to sale, and was purchased by his heirs. The auction purchasers, heirs of Narain Singh, thereupon sued the second mortgagees to recover possession of the shares purchased by them and obtained a decree upon the 21st of August 1889. Thereupon the heirs of the second mortgagees sued the heirs of Narain Singh, the first mortgagee, to redeem the mortgage of 1863, and got a decree on the 9th of June 1890. Finally Kirat and another, purchasers of the interests of Rup Singh and some of his brothers in execution of a simple money decree, sued to recover possession of the property comprised in the mortgage of 1873 upon payment only of the amount due on that mortgage. *Held* that the plaintiffs could not succeed without also paying off the amount due under the prior mortgage of 1863.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. Muhammad Raoof and Maulvi Muhammad Zahur, for the appellants.

Babu Durga Charan Banerji and Munshi Gobind Prasad, for the respondents.

STANLEY, C. J., and BANERJI, J.—The judgment of the lower appellate Court from which this appeal has been

\* Second Appeal No. 1130 of 1902 from a decree of W. A. W. Last, Esq., District Judge of Shahjahanpur, dated the 13th of September 1902, confirming a decree of Khanzadah Muhammad Musharraf Ali Khan, Munsif of Bisauli, dated the 30th of April 1902.

1904

KIRAT

v.

DEBI SINGH.

preferred is very unsatisfactory and is not in compliance with the provisions of the law. Had the question involved in the case not been one purely of law, it might have been necessary for us to send back the case to the lower appellate Court for recording a proper judgment. However, having regard to the circumstances of this case, we do not deem it necessary to do so. The suit was one for the redemption of a usufructuary mortgage, dated the 17th of June 1873, made by one Rup Singh in favour of Tula Ram and Cheda Lal. Rup Singh was one of the five sons of one Bikram Singh who made a simple mortgage to one Narain Singh on the 2nd of June 1863. In 1879 Narain Singh obtained a decree for sale on the strength of his mortgage, but he did not join as defendants to his suit the puisne mortgagees Tula Ram and Cheda Lal. The plaintiffs are the purchasers of the interests of Rup Singh and some of his brothers in execution of a simple decree for money. In execution of the decree which Narain Singh obtained upon his mortgage of 1863 three-fourths of the mortgaged property were sold and were purchased by the heirs of Narain Singh, who had in the meantime died. They sued the heirs of the puisne mortgagees Tula Ram and Cheda for possession of the share so purchased in the property mortgaged by Rup Singh, and obtained a decree on the 21st of August 1889. Thereupon the heirs of Tula Ram and Cheda Lal brought a suit against the heirs of Narain Singh for redemption of the mortgage of 1863, obtained a decree on the 9th of June 1890, and recovered possession of the property of the possession of which they had been deprived by the decree of 1889. The plaintiffs, as we have stated above, have brought the present suit to redeem the mortgage of 1873, and they seek to recover possession of the property comprised in that mortgage upon payment only of the amount of that mortgage. The Court of first instance dismissed the suit on the ground that the plaintiffs were not entitled to recover possession upon payment of the amount of the mortgage of 1873 only, but were also bound to pay the amount of the mortgage which had been redeemed by the heirs of the puisne mortgagees, Tula Ram and Cheda Lal. This decree has been affirmed by the lower appellate Court. In our judgment the plaintiffs' suit

1904

KIRAT

v.

DEBI SINGH.

has been rightly dismissed. The defendants are in possession not only by virtue of the mortgage obtained by them but also because they have redeemed the prior mortgage of 1863. They have stepped into the shoes of the holders of that mortgage and are entitled to hold up the amount of that mortgage as a shield against any claim that might be brought against them for ousting them from possession of the mortgaged property. The plaintiffs did not in their suit offer to redeem the first mortgage, nor have they at any later stage of the proceedings ever consented to do so. Their suit has therefore been rightly dismissed, and we dismiss this appeal with costs.

*Appeal dismissed.*

1904  
November 11.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.*

GOBIND PRASAD AND OTHERS (PLAINTIFFS) v. INAYAT KHAN

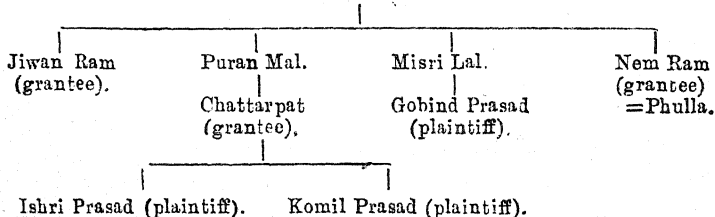
AND ANOTHER (DEFENDANTS).\*

*Construction of document—Grant of zamindari by Government to member of a joint Hindu family and another—Joint tenants—Tenants in common.*

In 1886 Government granted, as a reward for services rendered during the Mutiny, certain zamindari property to Jiwan Ram, Chattarpat, and Nem Ram, members of a joint Hindu family and to one Puse, a stranger to the family. Puse shortly afterwards got his share separated. Nem Ram died leaving a widow Musammat Phulla, and after his death Jiwan Ram, Chattarpat and Phulla joined in selling a portion of the property, the subject of the grant of 1866, to one Nur Ahmad. *Held*, on suit by certain members of the joint Hindu family, who were not parties to the sale, to recover from the representatives of the vendees the share in the property sold which had been of Nem Ram in his life-time, that the grant of 1866 conveyed the property to the grantees as joint tenants and not as tenants in common, and therefore the transfer impugned was valid.

The subjoined pedigree illustrates the relationship of most of the persons connected with the present suit.

TULSHI RAM.



\* Second Appeal No. 167 of 1903, from a decree of H. B. J. Bateman, Esq., Judge of Bareilly, dated the 29th of November 1902, reversing a decree of Babu Prag Das, Subordinate Judge of Bareilly, dated the 11th of March 1902.



1904

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GOBIND  
PRASAD  
v.  
INAYAT  
KHAN.

In the year 1866 the Government of the North-Western Provinces, in recognition of loyal service, granted five villages to Jiwan Ram, Chattarpat, Nem Ram and Puse. The last mentioned who was a stranger to the family of which the other three grantees were members, got his share in the grant partitioned shortly afterwards. In 1874, Nem Ram having died, Jiwan Ram, Chattarpat and Phulla, Nem Ram's widow, sold their  $7\frac{1}{2}$  biswas to Nur Ahmad, from whom the defendants derive title. Phulla died in 1896, and Chattarpat in 1899. In 1901 the plaintiff Ishri Prasad and Komil Prasad, sons of Chattarpat, and Gobind Prasad, son of Misri Lal, brought the present suit to recover possession of the share of Nem Ram, with mesne profits, alleging that Nem Ram's widow, Phulla, had no power to alienate more than her life-interest in the property. The Court of first instance (Subordinate Judge of Bareilly) found that the four grantees did not take jointly, but severally, and in consequence decreed the plaintiffs' claim with mesne profits for three years. On appeal by the defendants the District Judge reversed the decree of the Court below and dismissed the plaintiffs' suit, finding that the property in suit was the joint property of Jiwan Ram, Chattarpat and Nem Ram. The plaintiffs thereupon appealed to the High Court.

Munshi *Gulzari Lal* and Babu *Sital Prasad Ghosh*, for the appellants.

Maulvi *Ghulam Mujiaba*, for the respondents.

STANLEY, C. J., and BURKITT, J.—We agree with the learned District Judge in the conclusion at which he arrived in this case, but not in the reasons which he has assigned for his conclusion. The real question for determination is whether or not the grantee under a sanad from Government executed in the year 1866 in favour of four persons in recognition of services rendered by them to Government was a grant to them as joint tenants or as tenants in common. The grantees are two sons of one Tulshi Ram, namely, Jiwan Ram and Nem Ram, also one Chattarpat a grandson of Tulshi Ram, son of a deceased son Puran Mal, and a fourth person, who was a stranger to the family, named Puse. It is admitted that shortly after the execution of the grant Puse effected a partition of his interest in the property

1904

GOBIND  
PRASAD  
v.  
INAYAT  
KHAN.

which was 10 biswas in a patti called Nasara patti. There is nothing in the language of the grant to indicate that the grant was made to the grantees in specified or in equal shares. It is made to the four grantees simply without specification of any shares. The learned District Judge came to the conclusion that the grant was really to a joint family, and that the property was subject to all the incidents of joint family property. The Court of first instance on the contrary found that the grant was a grant to the grantees as tenants in common. There is nothing in the language of the deed to lead us to suppose that the grant was a grant to a joint family; on the contrary, the fact that one of the grantees was a stranger to the family seems to us to indicate that the idea of a joint family did not enter into the mind of the framer of the grant. There is further this fact that one of the sons of Tulshi Ram who is found to have been alive at the date of the grant, namely, Misri Lal, the father of the plaintiff Gobind Prasad, is not mentioned in the sanad at all. If it had been intended to make the grant to the joint family of Tulshi Ram, it appears to us that his name would not have been excluded from the grant. Now it appears that in the year 1874 two of the grantees Jiwan Ram and Chattarpat, with whom Musammat Phulla, the widow of Nem Ram who was then dead, joined, sold their share to Nur Ahmad, from whom the defendants derive their title. If the grant was, as we think it was, a grant to the grantees as joint tenants, then on the death of Nem Ram his share lapsed to the other grantees Jiwan Ram and Chattarpat, Puse having previously effected a partition of his share. It is said, however, that the fact that Musammat Phulla joined in the deed shows that the parties regarded the interest of Nem Ram as the interest of a tenant in common. We do not think that there is any force in this contention. It may be that the purchaser for the sake of precaution asked that she should join in the deed, and that she accordingly executed it. At all events, upon the construction of the language of the sanad, we think that the grant made to the four grantees, three being members of one family and the other a stranger was a grant to them as joint tenants. This being so, on the death of Nem Ram his share

lapsed to his brother and nephew, the other grantees, and Misri Lal or his son acquired no interest whatever in the property. We therefore for these reasons dismiss the appeal with costs.

*Appeal dismissed.*

1904

GOBIND  
PRASAD  
v.  
INAYAT  
KHAN.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*

KHUDA BAKHSH AND OTHERS (DEFENDANTS) v. ALIM-UN-NISSA

AND OTHERS (PLAINTIFFS).\*

1904

November 16.

*Mortgage—Usufructuary mortgage followed by lease to mortgagor—Suit for redemption—Arrears of rent sought to be included in the mortgage debt—Diminution of security—Acquiescence of mortgagee in loss of part of the security.*

The day after the execution of a usufructuary mortgage, the mortgagor entered into an agreement with the mortgagees to rent the mortgaged premises from them. The qabuliat executed in pursuance of this agreement provided that the rent, a fixed annual payment, should be a charge on the property leased; but the qabuliat was neither executed nor registered on the same day as the mortgage, nor were the terms of the two instruments coincident. *Held* that the two transactions must be treated as separate, and the mortgagor could not be compelled, as a condition precedent to redemption of the mortgage, to pay off the charge created by the qabuliat. *Tajjo Bibi v. Bhagwan Prasad* (1), referred to.

At the time of the mortgage one of the mortgaged villages was the subject of a suit for pre-emption which was ultimately successful and the village passed out of the hands of mortgagees. The mortgagees, however, made no effort to obtain any equivalent from the mortgagor, but remained in possession of the rest of the mortgaged property for some years, apparently satisfied with the security. *Held* that the mortgagees were not under the circumstances entitled to claim anything from the mortgagor on redemption on account of the rents and profits of the village of which they had been so deprived. *Partab Bahadur Singh v. Gajadhar Bakhsh Singh* (2), referred to.

On the 14th of March 1889, Musammat Kundan Begam mortgaged shares in several villages, and other property, by way of usufructuary mortgage to Khuda Bakhsh and others. The mortgage was registered on the 16th of March. The term of the mortgage was five years and it was redeemable in any subsequent year in the month of Phagun. Nothing was said about interest in the mortgage deed, the rents and profits of the

\* First Appeal No. 233 of 1902 from a decree of Lala Mata Prasad, Subordinate Judge of Moradabad, dated the 13th of September 1902.

(1) (1894) I. L. R., 16 All., 295. (2) (1902) L. R., 29 I. A., 148, S. C., I. L. R., 24 All., 521.

1904

KHUDA  
BAKHSH  
v.  
ALIM-UN-  
NISSA.

mortgaged property being taken in lieu thereof. But there was a provision to the effect that if the mortgagees were deprived of possession of any part of the mortgaged property they should be entitled to repayment of the mortgage money. On the 15th of March the mortgagor executed a qabuliat in favour of the mortgagees acknowledging that she had taken a lease of the mortgaged property on a jama of Rs. 2,070-13-3 a year from March 1889 to September 1893, *i.e.*, a term somewhat less than that of the mortgage. By this qabuliat the rent payable was made a charge upon the property. This qabuliat was registered on the 5th of April 1889. Out of the property mortgaged some portion, consisting of a share in the village of Adampur, was, at the date of execution of the mortgage, the subject of a suit for pre-emption brought by one Ashiq Husain against the mortgagor. In that suit the plaintiff obtained a decree, and the property decreed was handed over to him. On the 1st of April 1902 the representatives of the mortgagor brought the present suit for redemption of the mortgage of 1889 on payment of the original mortgage money, Rs. 10,000. Amongst the various pleas raised by defendants in their written statement were the two following:—(1) “Musammat Kundan Begam paid the lease money only for a year to the answering defendants, and the lease money up to rabi 1301 Fasli, *i.e.*, up to the time she was in possession, is still due to the answering defendants,” and (2) “out of the mortgaged property a  $\frac{1}{5}$  biswa share in Adampur was taken possession of by Ashiq Husain Khan under a decree for pre-emption during the currency of the lease and the answering defendants were deprived of the profits therefrom which amount to nearly Rs. 600 per annum.” Upon the issues framed on these pleas the Court of first instance (Subordinate Judge of Moradabad) found that the mortgage and the lease were separate transactions, and the defendants could not therefore recover arrears of rent, if there were any, in the present suit. As to the share in Adampur it held that the defendants had virtually acquiesced in the loss of this portion of their security, and were not entitled to claim anything in respect thereof, not having chosen to avail themselves of the stipulation in the mortgage-deed thereanent. The Court gave the plaintiffs a decree

for redemption upon payment of Rs. 11,428-10-3. From this decree the plaintiffs appealed to the High Court.

Pandit *Moti Lal Nehru*, Pandit *Sundar Lal* and Maulvi *Muhammad Zakur*, for the appellants.

Babu *Jogindro Nath Chaudhri* and Munshi *Gokul Prasad*, for the respondents.

1904

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KHUDA  
BAKHS  
v.  
ALIM-UN-  
NISSA.

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*Stanley, C. J.*

STANLEY, C. J.—In the view which I take of the mortgage and qabuliat which have been referred to in this appeal, the main question raised in the appeal appears to me to present little difficulty. I am of opinion that the two documents cannot be read as together forming one transaction, but that they must be regarded as separate and independent transactions. It appears to me that the learned Subordinate Judge was right in the view which he took of this question. He says that “the mortgage and the lease were different transactions, independent of each other, carrying with them different liabilities and obligations.” The mortgage is in fact a simple usufructuary mortgage, containing the usual provision that the mortgagees shall be put into possession of the property and that they shall continue to hold such possession during the subsistence of the mortgage, that is, the mortgagees shall have actual possession of the property so long as the mortgage subsists. The qabuliat, which was executed by the mortgagor the day succeeding the day of the execution of the mortgage, alters the relations of the parties to some extent. It is evidence of an agreement whereby the mortgagor was placed in possession of the mortgaged property on his undertaking to pay a fixed jama of Rs. 2,070-13-3 out of the rents and profits to the mortgagees. Further, the qabuliat provided that the rent should be a charge upon the property, the subject-matter of the lease. It has been pointed out in the course of the argument that the term of the lease does not correspond with the term of the mortgage, and in no way, as it appears to me, can the two documents be interpreted as representing one indivisible transaction. Now if this be so, the mortgage being a simple usufructuary mortgage, the provisions of section 62 of the Transfer of Property Act clearly apply. That section in the case of a usufructuary mortgage enables the mortgagor, on payment of the amount due under



1904

KHUDA  
BAKHSH

v.

ALIM-UN-  
NISSA.

Stanley, C. J.

the mortgage, to redeem the mortgaged property. It has been decided in the case of *Tajjo Bibi v. Bhagwan Frasad* (1), that where there is a usufructuary mortgage and a subsequent simple mortgage of the same property, in the absence of a special agreement that the two mortgages shall be redeemed simultaneously, the mortgagor is entitled to redeem the usufructuary mortgage without redeeming the simple mortgage. Now there is nothing in the qabuliat or in the mortgage to show that there was any agreement between the parties that the usufructuary mortgage should not be redeemed unless the charge created by the qabuliat was also paid off. Therefore it appears to me that, on the main contention raised, the mortgagors are entitled to redeem the usufructuary mortgage, independently altogether of any consideration of the subsequent qabuliat and the provisions contained in it, and cannot be compelled as a condition precedent to redemption to pay off the charge created by the qabuliat.

Another question, however, has been raised on behalf of the appellants and that is this. The mortgaged property comprised, among other villages, a village called Adampur. Of this village along with others the mortgagees were placed in possession, but shortly after, some time early in the year 1890, a party who was entitled to pre-empt this property obtained a decree for pre-emption, and on the 25th of May 1891, in pursuance of his decree, dispossessed the mortgagees. The effect of this was that the security of the mortgagees was diminished by the loss of this village. The mortgagees in the present suit for redemption contend that they are entitled to have an account taken of what the profits of the village Adampur amount to, and they claim that the usufructuary mortgage can only be redeemed on payment of the amount of these profits in addition to the sum due on the mortgage. The answer to this contention is to be found in the fact that, notwithstanding that the mortgagees were dispossessed in the year 1891, they remained satisfied with their security, took no steps to enforce payment of the amount due under it, took no steps for an enhancement of the rents and profits of the remaining lands so as to recoup them for the loss of Adampur, and in fact acquiesced in the loss of this portion

of their security and remained content with the remainder of the lands in their possession. The case is met by the decision of their Lordships of the Privy Council in the case of *Raja Partab Bahadur Singh v. Gajadhar Bakhsh* (1). In that case, upholding a decision of the Judicial Commissioner of Oudh, their Lordships held that where a usufructuary mortgagee was dispossessed of several villages, shortly after the execution of the mortgage, and acquiesced in his diminished security for upwards of 30 years, he could not thereafter claim interest in lieu of the rents and profits of the property of which he was dispossessed by reason of the mortgagor's failure to secure his possession thereof. I am unable to distinguish this case from the one before us, and therefore think that the contention of the appellants in regard to it fails.

The only remaining question is the question of the costs of the suit. The Court below has given a decree to the plaintiffs-respondents with costs. Now in a redemption suit the usual course is to give the mortgagee his costs unless he has been guilty of such conduct as would disentitle him to costs. In this case, no doubt, he put forward claims which were untenable, but he established his claim to a sum of upwards of Rs. 1,400 over and above the amount which the plaintiffs were willing to pay to him. Having succeeded to this extent, I see no reason to deprive him of the costs of the suit. The claim based upon the qabuliat is apparently a perfectly just and a fair one. It is only because we considered that it could not be entertained in the present suit that we have rejected it. In my opinion the mortgagees were not guilty of such conduct as disentitled them to costs in the Court below, and therefore I think that, whilst we uphold the decree of the Court below for redemption, we ought to modify that decree by giving the appellants their costs in that Court. As regards the costs of this appeal, I think the parties should abide their own costs respectively.

BANERJI, J.—I too have arrived at the same conclusion as the learned Chief Justice. The suit was one for the redemption of a mortgage made by one Kundan Begam in the year 1889. Shortly after the mortgage she made a waqf of the mortgaged

1904

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KHUDA  
BAKHS  
v,  
ALIM-UN-  
NISSA.

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Stanley, C. J.

1904

KHUDA  
BAKHSH

v.

ALIM-UN-  
NISSA.*Banerji, J.*

property, and the plaintiffs are the trustees under the waqf. The Court below has made a decree in favour of the plaintiffs declaring them liable to pay a certain sum in addition to Rs. 10,000, the principal amount of the mortgage. The appellants contend that they are entitled to two other sums, namely, (1) certain profits due to them under a lease executed in their favour by the mortgagor on the day following that of the mortgage, and (2) the profits of the village Adampur of the possession of which they were deprived shortly after the mortgage. They also raise the question of the costs of the suit and contend that they are entitled to costs also.

As regards the first point the defendants cannot claim in their suit arrears of what is really lease money payable under the lease executed by the mortgagor, unless they can show that the mortgage and the lease represent one transaction, namely, a transaction of mortgage, the lease only providing the mode in which the interest upon the mortgage was to be paid. As was observed in the case of *Altaf Ali Khan v. Lutta Prasad* (1), each case must be decided with reference to its own peculiar circumstances. We have therefore to see whether the lease in this case was really a part of the mortgage. There are considerations which lead me to the conclusion that the two transactions were not one and the same. The lease was executed, not on the date of the mortgage, but on a subsequent date. The two documents were not registered at one and the same time, as they would have been had they formed one transaction. What is more important is that two documents do not cover the same period. It is thus evident that the intention of the parties was that the lease was not to be regarded as a part of the mortgage transaction. The remedy of the mortgagees for the money payable to them under the lease is distinct from the remedy open to them under the mortgage, and for such money as is due to them under the lease they ought to resort to the remedy which the lease affords to them. Under the terms of the lease the mortgaged property is hypothecated for the rent payable under it. If there are any arrears due, the mortgagees may, if so advised, seek to enforce the hypothecation and recover

1904

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 KHUDA  
 BAKHSH  
 v.  
 ALIM-UN-  
 NISSA.  


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*Banerji, J.*

what is due to them, but they are not entitled in this suit to claim that, as a condition precedent to redemption, the plaintiffs must pay the arrears of lease money. As the learned Chief Justice has pointed out, the fact that they held a lien on the mortgaged property for such arrears cannot preclude the plaintiffs from redeeming the usufructuary mortgage of 1889 upon payment of what is due under that mortgage. The Court below was therefore right in refusing to allow to the appellants the amount which they claimed to be due to them as arrears of lease money.

As regards the profits of the village Adampur, I fully agree with the Chief Justice. The mortgage deed does not provide any specific rate of interest upon the principal amount secured by it. The usufruct of the mortgaged property was to be taken by the mortgagees in lieu of interest. The village of Adampur had before the mortgage been purchased at auction by the mortgagor. A suit for pre-emption was brought in regard to that purchase, and succeeded, with the result that the pre-emptor obtained possession of the village. At the time when the mortgagees took the mortgage the mortgagor possessed in regard to the village of Adampur only a defeasible right. After the decree for pre-emption, and after the holder of that decree obtained possession so far back as the year 1891, the mortgagees made no attempt to obtain from the mortgagor an equivalent for the security which they lost in consequence of the pre-emption decree. We must take it that they acquiesced in the loss of that security and took and enjoyed the usufruct of the remainder of the property in lieu of the interest payable to them. It is difficult to distinguish this case from the principle of the Privy Council ruling to which the Chief Justice has referred. The defendants therefore are not entitled to the amount which they claimed in consequence of their not having obtained possession of the village Adampur.

As regards costs I have nothing further to add to what has been said by the learned Chief Justice, and I fully agree with him.

BY THE COURT.—The order of the Court is that the decree of the Court below be varied to this extent that the defendants

1904

KHUDA  
BAKSH

v.

ALIM-UN-  
NISSA.

appellants be allowed their costs in the Court below. In other respects we affirm the decree of that Court. As regards the costs of this Court we direct that the parties respectively shall bear their own costs. We allow the respondents two months from this date for payment of such further amount as is due to the appellants.

*Decree modified.*

P. C.

1905

February 17.

March 16.

## PRIVY COUNCIL.

MUHAMMAD MUNAWAR ALI (DEFENDANT) v. RAZIA BIBI AND OTHERS  
(REPRESENTATIVES OF THE PLAINTIFF) AND 4 OTHER APPEALS.

[On appeal from the High Court, North-Western Provinces.]

*Muhammadan Law—Endowment—Waqf—Illusory dedication—Settlement mainly for benefit of descendants of settlers—Small charge on profits of estate for religious and charitable purposes.*

Where the substantial object of a deed was to maintain the name and dignity of the family of the executants, and to make provision for its members and their descendants in perpetuity, and it created a mere charge of inconsiderable amount on the profits of the estate for some charitable purposes, but made no dedication of the bulk of the property to any religious or charitable uses : *Held* by the Judicial Committee (affirming the decision of the High Court) that the deed did not constitute a waqf valid by Muhammadan Law.

FIVE appeals consolidated from a decree (3rd May 1899) of the High Court at Allahabad by which a decree (16th September 1896) of the Subordinate Judge of Jaunpur was affirmed, and two other decrees (28th June 1897 and 16th April 1898) of the same Court were reversed.

The suits out of which the appeals arose were all brought to set aside a waqf-nama or deed of endowment jointly executed on 9th March 1881 by Aliat-un-nissa Bibi and her husband, Muhammad Qaim Ali, as being invalid by Muhammadan Law.

The facts are sufficiently stated in their Lordships' judgment and in the judgment appealed from (BURKITT and BLAIR, JJ.), which is reported in I. L. R., 21 All., 329.

On this appeal

Mr. DeGruyther, for the appellant, contended that on the construction of the deed of endowment there was a sufficiently

*Present* :—Lord DAVEY, Lord ROBERTSON and SIR ARTHUR WILSON.



substantial dedication to religious or charitable purposes to constitute a valid waqf by Muhammadan Law. The fact that due provision was made for the support of the family of the settlers did not necessarily make the deed invalid as a waqf. Reference was made to *Mohamed Ahsanulla Chowdhry v. Amarchand Kundu* (1); *Abdul Fata Mahomed Ishak v. Rasamaya Dhur Chowdhri* (2); *Mujib-un-nissa v. Abdur Rahim* (3); Baillie's Moohummudan Law, 595; *Muzurool Haq v. Puhraj Ditarey Mohapattur* (4); and *Phul Chand v. Abbas Yar Khan* (5).

On the question of limitation it was contended that the suit for Asima's share of the property of Aliat-un-nissa was barred, the possession of Qaim Ali having been adverse to the plaintiff.

Mr. C. W. Arathoon, for the respondents, contended that to constitute a valid waqf by Muhammadan Law there must be a substantial dedication of the property to religious or charitable uses. Here there was no dedication at all. The deed created a small charge on the property for some charitable purposes, but imposed no obligation to pay it; and the substantial object of the deed was the benefit and support in perpetuity of the settlers' family. Reference was made to *Abdul Gafur v. Nizam-uddin* (6).

As to limitation, it was contended that the possession of Qaim Ali after Aliat-un-nissa's death had been permissive, and in no sense adverse, and this had been rightly held by the High Court. The suit for Asima's share of Aliat-un-nissa's property was consequently not barred.

Mr. DeGruyther replied

1905, March 16th.—The judgment of their Lordships was delivered by SIR ARTHUR WILSON:—

These consolidated appeals relate to a deed, purporting to be a waqf-nama, executed on the 9th March 1881 by a Muhammadan lady, Aliat-un-nissa Bibi, and her husband, Muhammad Qaim Ali. The larger part of the property affected by that

1905

MUHAMMAD  
MUNAWAR  
ALI  
v.  
RAZIA  
BIBI.

- (1) (1889) L. R., 17 I. A., 28; I. L. R., 17 Calc., 498. (3) (1900) L. R., 28 I. A., 15; I. L. R., 23 All., 233.  
(2) (1894) L. R., 22 I. A., 76; I. L. R., 22 Calc., 619. (4) (1870) 13 W. R., 235.  
(5) (1896) I. L. R., 19 All., 211.  
(6) (1892) L. R., 19 I. A., 170; I. L. R., 17 Bom., 1.

1905

MUHAMMAD  
MUNAWAR  
ALI  
v.  
RAZIA  
BIBI.

deed belonged to the lady, the rest to her husband. She died on the 19th April 1881, and her husband remained in possession of the property from that time until his own death on the 11th February 1895.

The executants of the deed had two sons and four daughters; one of the daughters, Asima, died after her mother but before her father, the other children survived both their parents. On the death of the father the elder son, the now appellant, took possession of the property, claiming to be entitled to it as mutawalli under the deed of waqf.

Three suits were thereupon brought by the three surviving daughters, in which they alleged that the deed created no valid waqf, but that the property descended to the heirs of their mother, and they claimed their shares accordingly against the defendant, now the appellant, with mesne profits. The defendant relied upon the validity of the waqf-nama, and upon his title as mutawalli under it. He also set up other defences which need not now be considered. The Subordinate Judge of Jaunpur, who heard these three cases, held that the deed created no valid waqf, and made decrees in favour of the plaintiffs.

The next suit was filed by the second son, in which he raised a claim exactly similar to that raised by his sisters in the first three suits, and was met by similar defences. That suit was dismissed on a ground which has since been abandoned. The case therefore now stands on exactly the same footing as the previous cases.

The last suit was filed by one of the daughters, who had been plaintiff in one of the first three suits. It related to the share of her sister, Asima (who, as has been mentioned, died after her mother but before her father) as one of the heirs of her mother, in which share the plaintiff in this last suit has acquired an interest by purchase. This suit, like the others, raised the question of the validity of the alleged waqf, but it was dismissed on the ground of limitation.

Against all these decisions appeals were brought to the High Court, and that Court affirmed the decisions of the First Court in the three cases in which it had found in favour of the

1905

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MUHAMMAD  
MUNAWAR  
ALI  
v.  
RAZIA  
BIBI.

---

plaintiffs, and reversed its decisions in the two cases in which it had found for the defendants. Against those decrees of the High Court the present appeals were brought.

The main question raised by the appellant, the one question common to all the cases, and the only question in the first four of them, is whether the deed of the 9th March 1881 created a valid waqf. Both the Courts in India have answered the question in the negative. They have laid down the rule of law by which they were guided, and for the purpose of applying it to the deed now in question have minutely examined the clauses of that deed.

As their Lordships are of opinion that those Courts have correctly apprehended the law applicable to the case, and as they agree in the view that has been taken as to the character of the deed, their Lordships think it unnecessary to discuss the law on the subject, which has already been more than once considered by this Board, or to examine in detail all the provisions of the deed. It will be sufficient to point out its character somewhat generally. It begins with recitals in which the intending settlors put their own construction upon the deed, and state the objects for which they executed it and the effect they intended it to have. They say it is necessary "that sufficient provision be made for the thorough management of the entire property, and the *imlak* belonging to the executants, and the income and profits therefrom (which, taken as a whole, forms a small estate); so that the property itself and the principal wealth of the estate may always be preserved from all manner of partition, division, transfer, and succession, and the management thereof in whole and in part should remain for ever in the hands of one person, whereby our name and memory, and the pomp and dignity of the estate, may continue;" and that "the attainment of the above object is impossible except by a waqf."

Turning to the operative clauses of the deed, the first and the most general in its terms is paragraph 4, by which the executants "make waqf . . . in favour of our respective selves, and after the death of one of us (the executants) in favour of the surviving executant alone, and thereafter in

1905

MUHAMMAD  
MUNAWAR  
ALI  
v.  
RAZIA  
BIBI.

favour of our descendants, generation after generation, so long as they exist, and in favour of the servants and dependants of the *riyasat* (estate) aforesaid and in favour of the poor, the beggars and the needy for ever in the manner detailed below."

The numerous clauses that follow are entirely in accord with the purpose stated in the preamble and embodied in the fourth paragraph. The bulk of the property is not affected by any religious or charitable trusts. The rules laid down are almost all expressly directed to securing Qaim Ali in the full enjoyment of the whole estate as long as he lived, to keeping that estate in perpetuity entire and inalienable under efficient management by a single person, to maintaining the dignity of the family, and to making provision for its members. The religious and charitable clauses are no exception. They are ancillary to the real purpose of the deed; they deal with matters naturally incident to maintaining the dignity of the family, and their secondary character is further apparent from the fact that, while the deed purported to create the waqf as from its date, the religious and charitable trusts were not to become obligatory till after the deaths of both the executants. The name and form of a waqf are avowedly adopted in the hope of gaining legal recognition for a transaction which without them could have no validity. It follows that the deed created no valid waqf. And this disposes of the first four appeals.

With regard to the fifth appeal another point was raised. It was said that Asima having died after her mother but before her father, those who now stand in her place could at most claim, as they do claim, her share in her mother's estate, but, of course, no share in her father's; and that her father, by his exclusive enjoyment of the mother's estate, had acquired a title to it as against the heirs of the mother, and that, therefore, the claim to Asima's share was barred.

The answer to this contention is that it assumes the father's possession to have been adverse to the heirs of the mother. But the High Court has held that that possession was not adverse, and no reason has been shown to their Lordships which could lead them to dissent from that finding.

Their Lordships will humbly advise His Majesty that these appeals should be dismissed. The appellant will pay the costs.

*Appeals dismissed.*

Solicitors for the appellant:—Messrs. *Watkins and Lampriere.*

Solicitors for the respondents:—Messrs. *T. L. Wilson & Co.*

*J. V. W.*

1905

MUHAMMAD  
MUNAWAR  
ALI  
v.  
RAZIA  
BIBI.

GOPI NARAIN KHAUNA AND OTHERS (REPRESENTATIVES OF THE PLAINTIFF) v. BANSIDHAR (DEFENDANT).

[On appeal from the High Court, North-Western Provinces.]

*Execution of decree—Questions in execution—Mortgage by conditional sale—Decree for foreclosure—Payment by puisne mortgagee defendant in prior mortgagee's suit for foreclosure—Application by such puisne mortgagee for decree absolute for foreclosure—Subsequent suit by him for foreclosure—Civil Procedure Code, section 244—Act No. IV of 1882 (Transfer of Property Act), sections 74, 86—Form of decree.*

In a suit brought by the respondent as prior mortgagee for foreclosure of a mortgage by conditional sale, in which the appellant, a second mortgagee of the same property, was a defendant, a decree was passed for foreclosure and allowing six months for redemption, and a similar decree was made in a suit brought by the respondent and the appellant as second mortgagees. Eventually, as the mortgagors (the other defendants) made no payment to secure redemption, and in order to prevent a decree absolute for foreclosure against himself, the appellant paid into Court the sum due under the decree in the first suit, and it was drawn out by the prior mortgagee. The appellant then made an application to the Court in that suit that, as he had by his payment become, under section 74 of the Transfer of Property Act, the representative of the prior mortgagee, a decree for absolute foreclosure might be passed in his favour. The Court held that he was entitled to bring a suit for foreclosure, but that "he had not acquired the status of a decree-holder," and that "while he was a defendant he could not execute the decree as a decree-holder," and the application was dismissed. *Held* by the Judicial Committee (reversing the decision of the High Court) that a subsequent suit brought by the appellant for foreclosure was not barred by section 244 of the Civil Procedure Code, the questions between the parties not being such as could have been determined by the Court in execution of the decree in the former suits.

That decree (which appeared to be a transcript of the form of order given in section 86 of the Transfer of Property Act) did not provide for the exercise by the puisne incumbrancers of their successive rights of redemption, or for working out the rights of the parties in the event of any puisne incumbrancer, in front of the mortgagor, redeeming the mortgaged property.

*Present:—Lord DAVEY, Lord ROBERTSON and Sir ARTHUR WILSON.*

P. C.  
1905  
February 24,  
28.  
March 16.



1905

GOPI  
NARAIN  
KHAUNA  
v.  
BANSIDHAR.

An appropriate decree for that purpose in use in the English Courts given in Seton on Decrees, 6th Edition, Vol. III, page 1979, referred to.

APPEAL from a judgment and decree (December 10th, 1901) of the High Court at Allahabad, which reversed a decree (June 23rd, 1898) of the Subordinate Judge of Mainpuri.

The present appellants are the representatives of the plaintiff in the suit, in which the present respondent was a defendant.

The suit was brought for foreclosure of a mortgage by way of conditional sale of a village, called Patara, by one Gaya Prasad as 2nd mortgagee against Bansidhar, the present respondent and one Kunj Behari Lal, prior mortgagees, Rani Indomati, widow and heir of the mortgagor, and one Prag Narain, son of one Nawal Kishore, deceased, 3rd mortgagee.

The plaint asked for the following relief:—

“(a) That the Court may, without allowing redemption, pass a decree absolute, for foreclosure of village Patara, including the hamlets (naglas) appertaining thereto, pargana Krahall, district Mainpuri, in lieu of Rs. 15,093, which the plaintiff alone paid, and acquired under section 74, Act IV of 1882, according to law, the rights and interests possessed by the prior mortgagees, the foreclosure decree-holders in respect of the document, dated 20th July 1889.

“(b) If the Court for some reason gives defendants Nos. 3 and 4 opportunity to redeem, then a decree for foreclosure may be passed by the Court with the condition that defendants Nos. 3 and 4 should deposit in the Court, for payment to plaintiff, the sum of Rs. 15,093, with interest at Rs. 12 per cent. per annum from 3rd January 1896 to the date fixed by the Court for payment, with the addition of costs of the suit; otherwise all the right to redeem the mortgage should be extinguished, and the village Patara, together with the naglas appertaining thereto, should be absolutely foreclosed in favour of the plaintiff and possession awarded to him.

“(c) If in the Court's opinion a decree for foreclosure as prayed in reliefs (a) and (b) cannot be given for some reason, then a sum of Rs. 7,546-8-0 and interest at Rs. 12 per cent. per annum from 3rd January 1896 to the date of recovery, with

1905

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 GOPI  
NARAIN  
KHAUNA  
v.  
BANSIDHAR.

the addition of costs incurred in the Court, may be awarded against the person and property of Bansidhar, defendant No. 1, alone.

“(d) Any other relief which the Court considers to be beneficial to plaintiff according to law may be granted.”

The facts of the case are stated in their Lordships' judgment and in the judgment appealed from of the High Court (Sir J. STANLEY, C.J. and BURKITT, J.), which is reported in I. L. R., 24 All., 179.

On this appeal

Mr. G. E. A. Ross for the appellant contended that the suit was not barred by section 244 of the Code of Civil Procedure. The appellant alone paid the entire amount of the foreclosure decree of 22nd December 1894 passed in respect of the prior mortgage, and he thereby acquired, under section 74 of the Transfer of Property Act (IV of 1882), all the rights and interests possessed by the prior mortgagees. Those rights and liabilities he applied to have determined in execution of that decree. The present respondent opposed that application and the Court held that the decree having been satisfied no longer remained capable of execution, and the appellant was relegated to a separate suit for that relief. That decree, it was submitted, was final between the parties and could not have been appealed from. The Transfer of Property Act, sections 2, 74, 86, and 89; *Mallikarjunadu Setti v. Lingamurti Pantulu* (1); *Ram Kirpal v. Rup Kuari* (2); and *Mungul Pershad Dichit v. Grija Kant Lahiri Chowdhry* (3) were referred to. On the construction of the decree in the former suit it had been finally held, therefore, that the relief asked for in the present suit could not have been granted, so that the present suit was not barred. Reference was made to an unreported case, *Anand Sarup v. Rahim Bakhsh*, Suit 186 of 1899 decided by Sir J. Stanley, C.J. and Burkitt, J. on 30th April 1902. The appellant was, at any rate, entitled to the relief asked for in the third paragraph of the prayer of his plaint. In any event the decree of the High Court was erroneous in setting

(1) (1902) I. L. R., 25 Mad., 244 (253).

(2) (1883) L. R., 11 I. A., 37 (40); I. L. R., 6 All., 269 (274).

(3) (1881) L. R., 8 I. A., 123

(131, 132); I. L. R., 8 Calc., 51 (60).

1905

GOPI  
NARAIN  
KHAUNA  
v.  
BANSIDHAR.

aside the decree of the Subordinate Judge as against the defendants who did not appeal from it. The Civil Procedure Code, section 544, was referred to.

Mr. *Cowell* for the respondent contended that in the former suits (if not in suit 123 of 1893, then in suit 122 of 1893) all proper directions could have been given and accounts taken between the parties in order to adjust their relative rights and liabilities. These ought to have been decided in one or other of the former suits as being questions between the parties relating to the execution of the decree within the meaning of section 244 of the Civil Procedure Code. The appellant should have appealed from the order refusing his application in execution; instead of doing that he abandoned the suit, and there were now two suits on the file for the same relief, which was contrary to section 12 of the Code. All the parties were before the Court in the former suit: that was obligatory under section 85 of the Transfer of Property Act. See *Ghulam Kadir Khan v. Mustakim Khan* (1). A decree for foreclosure had already been passed in the former suit, and the appellant was not entitled to the same relief in this suit, which was therefore not maintainable. The judgment of the High Court was correct and should be upheld.

Mr. *Ross* replied.

1905, *March 16th*.—The judgment of their Lordships was delivered by LORD DAVEY:—

This is an appeal from a decree of the High Court at Allahabad, dated the 10th of December 1901, by which the previous decree of the Subordinate Judge of Mainpuri was reversed. The appellants are the representatives of the original plaintiff, Gaya Prasad, who died during the pendency of the suit. The case involves the consideration of some complicated mortgage transactions.

On the 20th of July 1889 Chaudhri Fateh Chand executed a mortgage by conditional sale in favour of the respondent Bansidhar and Kunj Bihari Lal for Rs. 7,101. The mortgaged property consisted of two villages Patara and Bhatpura.

On the 22nd of October 1889 the same mortgagor executed a second mortgage by conditional sale in favour of Anant Ram and the respondent for Rs. 10,000 and interest. This mortgage comprised Patara and eight other villages, not including Bhatpura. On the 1st of October 1891, Anant Ram sold his moiety of this mortgage to Gaya Prasad. The situation, therefore, as regards Patara was that the respondent and Kunj Bihari Lal were first mortgagees and the respondent and Gaya Prasad were second mortgagees.

On the 17th of September 1893 a suit (No. 123 of 1893) was commenced in the Court of the Subordinate Judge of Mainpuri for foreclosure of the first mortgage. As ultimately constituted this suit was by the respondent and Kunj Bihari Lal, the first mortgagees on Patara, against Chaudhri Raj Kunwar, son and heir of Chaudhri Fateh Chand, then deceased, Gaya Prasad, and one Munshi Nawal Kishore, who appears to have held a third mortgage on the same property. Bhatpura had been disposed of under a prior hypothecation and was excluded from the suit by order.

On the 27th of September 1893 another suit (No. 122 of 1893) was commenced in the same Court for foreclosure of the second mortgage. This suit, as finally constituted, was one by the respondent and Gaya Prasad against Chaudhri Raj Kunwar and Munshi Nawal Kishore.

On the 22nd of December 1894 decrees were made in both these suits. By the decree in the first suit it was ordered that on the defendant (*sic*) paying to the plaintiff (*sic*) or into Court on the 22nd of April 1895 the sum of Rs. 14,211-7-9, with future interest at the rate of eight annas per cent. per mensem, the plaintiff should deliver up to the defendant all documents in his possession relating to the mortgaged property, and should transfer the property to the defendant free from incumbrances created by the plaintiff, but if such payment were not made on the 22nd of April 1895, it was ordered that the defendant should be absolutely debarred of all right to redeem the mortgaged property. The decree in the second suit was in the same form *mutatis mutandis*.

1905

GOPI  
NARAIN  
KHAUNA  
v.  
BANSIDHAR

1905

GOP  
NARAIN  
KHAUNA  
v.  
BANSIDHAR.

Their Lordships will here observe that the decree in the first suit does not seem to be adapted to a suit by a first mortgagee against subsequent incumbrancers and mortgagor. It appears to be a transcript of the form of order given in section 86 of the Transfer of Property Act, 1882. That form contemplates a suit between one mortgagee and the mortgagor only, and should be treated as a common form not to be literally followed in every suit for foreclosure, but to be adapted to the particular circumstances of each case. The decree does not provide for the exercise by the puisne incumbrancers of their successive rights of redemption or for working out the rights of the parties in the event of any puisne incumbrancer in front of the mortgagor redeeming the mortgaged property so as to make a complete decree. An appropriate decree for that purpose is well known in the Chancery Division of the High Court in England, and a form of it will be found in Seton on Decrees, 6th edition, Vol. III, page 1979. Probably it is considered that the rights of the puisne incumbrancers are sufficiently protected by the provisions of sections 74 and 83 of the Transfer of Property Act. But it deserves consideration whether a form of order suitable for use in the Indian Courts might not be adopted in which those rights would be recognised and provision made for the event of their being exercised. The "defendant" in the decree before their Lordships apparently means the mortgagor only.

The time for redemption on the decree was from time to time enlarged, but the money was not paid by the mortgagor. On the 3rd of January 1896, when the enlarged time was about to expire, Gaya Prasad paid into Court the sum of Rs. 15,093, and that sum was taken out by the plaintiffs, the first mortgagees, in discharge of their mortgage.

On the 3rd of August 1897 Gaya Prasad made an application to the Court that a decree for absolute foreclosure of the mortgaged property might be prepared in his favour. This was successfully opposed by the present respondent. The Subordinate Judge was of opinion that as Gaya Prasad, defendant, paid up the amount due under the decree and complied with the order embodied in the decree, that decree no longer remained



capable of execution. He held that Gaya Prasad had become the representative of the prior mortgagee under section 74 of the Transfer of Property Act, and was entitled to bring a suit for foreclosure, but that he had not acquired the status of a decree-holder, and that while he was defendant he could not execute the decree as decree-holder. The application was therefore, by an order dated the 6th November 1897, dismissed with costs.

Gaya Prasad, therefore, on the 3rd of February 1898, commenced the present suit against Bansidhar, Kunj Bihari Lal, the widow and heir of Chaudhri Raj Kunwar then deceased, and the representative of Munshi Nawal Kishore, then deceased. The plaint contains a statement of all the material circumstances, but the prayer of it is inartificially framed. In the opinion of their Lordships, however, it was sufficient, with the aid of the prayer for further relief, to enable the Court to give the plaintiff the appropriate relief if he was otherwise entitled to it.

The respondent alone appeared and defended. By his written statement he contended that the suit was barred by section 244 of the Civil Procedure Code, or (in other words) that the questions in issue should have been determined by order of the Court executing the previous decree, and not by separate suit. This contention was in direct opposition to that which he had successfully put forward before the Subordinate Judge.

On the 22nd of June 1898 a minute was filed in the suit in which it was stated that a decree absolute for foreclosure had been made in the suit of the second mortgagees (No. 122 of 1893) on the 7th of May 1898. It was not thought necessary to make the mortgagor and third mortgagee (defendants 3 and 4 in the suit) respondents to this appeal, and both appellant and respondent seem to be agreed that the effect of the order for foreclosure absolute in the circumstances of the case was (as stated in paragraph 7 of the respondent's case) that the mortgagor and third mortgagee disappeared from the title, but the respondent retained a right to redeem a moiety of the mortgaged estate by paying to the appellants a moiety of his deposit in Court in suit No. 123 of 1893, with, of course, subsequent interest on the principal of such moiety.

1905

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GOPI  
NARAIN  
KHAUNA  
v.  
BANSIDHAR.

1905

GOPI  
NARAIN  
KHAUNA  
v.  
BANSIDHAR.

In these circumstances the Subordinate Judge made a decree, dated the 23rd June 1898, but this decree was not framed in a manner to work out the rights of the appellants and respondent who had become the only parties interested in the property.

On appeal by the respondent against this decree the learned Judges in the High Court held that the application of Gaya Prasad to the Subordinate Judge in the execution department for an order for foreclosure absolute, was the proper and only application he could have made, and ought to have been granted. In the result they held that the present suit was barred by the provisions of section 244 of the Civil Procedure Code, and that the plaintiff had mistaken his remedy, and should have appealed against the order of the 6th of November 1897 instead of instituting a separate suit. And by their decree, dated the 10th December 1901, it was ordered that the decree of the Subordinate Judge be set aside, and the suit be dismissed, but no order was made as to costs.

Their Lordships cannot agree with the learned Judges of the High Court that the respective rights of Gaya Prasad and the respondent, consequent on the redemption by the former of the first mortgage on Patara, could have been worked out in execution of the decree of the 22nd of December 1894, made in suit No. 123 of 1893, and they are of opinion that the order of the 6th of November 1897, made by the Subordinate Judge on Gaya Prasad's application to execute that decree was correct. Foreclosure is by the decree directed only in the event of the sum named not being paid into Court on or before the prescribed date. And their Lordships think that on payment by Gaya Prasad of the sum into Court before the expiry of the enlarged time, and acceptance of that sum by the plaintiffs, the decree was spent and became discharged and satisfied. There was therefore nothing left to be done in the execution department. It is true that Gaya Prasad, having made that payment (as he had the right to do), acquired under section 74 of the Transfer of Property Act all the rights and powers of the mortgagees as such. But this would not have the effect of reviving or giving vitality to a decree which by the terms of it had become discharged. Even if that were not so, their Lordships fail to

1905

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GOPI  
NARAIN  
KHAUNA  
v.  
BANSIDHAR.

see how the respective rights of Gaya Prasad, as owner of the first mortgage and half owner of the second and the respondent as owner of the other moiety of the second mortgage, could have been worked out without additions to the decree which the Court in executing the decree had no power to make. They are therefore of opinion that a new decree was required for the purpose, and section 244 of the Civil Procedure Code was not a bar to the present suit.

The learned counsel for the respondent no doubt was conscious of this difficulty, and he contended alternatively that Gaya Prasad might have obtained the relief to which he was entitled in the suit of the second mortgagees (No. 122 of 1893). But Bansidhar and Gaya Prasad were co-plaintiffs in that suit, and it is equally difficult to see how the rights of the plaintiffs *inter se* in respect of the first mortgage on Patara (which was not in question in that suit) could have been worked out in the decree in suit No. 122 of 1893.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, and that both the decree of the High Court, dated the 10th December 1901, and the decree of the Subordinate Judge, dated the 23rd June 1893, should be discharged, and that it should be declared that it appearing that in the events which have happened the appellants as representatives of Babu Gaya Prasad, the late plaintiff, and the respondent, Babu Bansidhar, defendant No. 1, as between themselves have become the owners in equal shares of the village Patara, with the hamlets (naglas) appertaining thereto in the plaint mentioned, subject to a charge thereon vested in the appellants for Rs. 15,093, being the sum paid into Court by Babu Gaya Prasad on the 3rd of January 1896 in suit No. 123 of 1893, together with subsequent interest from the last-mentioned date on the principal money comprised in that sum, the appellants are entitled to a decree in this suit, that upon the respondent, Babu Bansidhar, on or before a day to be fixed by the Court, paying to the appellants, or into Court, the sum of Rs. 7,546-8, being one moiety of Rs. 15,093, together with future interest at the rate of eight annas per cent. per mensem on Rs. 3,550-8, being one moiety of the principal sum of Rs. 7,101 in the plaint

1905

GOPI  
NARAIN  
KHAUNA  
v.

BANSIDHAR.

mentioned, from the 3rd of January 1896 to the date fixed for such payment, together with the costs incurred by the late plaintiff and the late plaintiff and the appellants in the Court of the Subordinate Judge of Mainpuri, including any future costs (the aggregate amount of such sums to be ascertained by the Court), the appellants shall accept the sum so paid in satisfaction of their said charge on the said property mentioned in the plaint so far as affects the respondent or his share in the said property, but if payment be not made on or before the said day to be fixed by the Court the respondent shall be absolutely debarred of all right to redeem his said share of the said property, and that each party should bear his own costs of the appeal to the High Court, and the case be remitted to the Court of the Subordinate Judge of Mainpuri, to proceed in accordance with the above declaration. The respondent will pay the costs of this appeal.

*Appeal allowed.*

Solicitors for the appellants—Messrs. *Barrow, Rogers, & Nevill.*

Solicitors for the respondent—Messrs. *Ranken Ford, Ford & Chester.*

J. V. W.

P. C.  
1905

*March 2, 24.*

QAMAR-UD-DIN AHMAD (JUDGMENT-DEBTOR) v. JAWAHIR LAL  
AND ANOTHER (REPRESENTATIVES OF DECREE-HOLDER).

[On appeal from the High Court, North-Western Provinces.]

*Execution of decrees—Act No. XV of 1877 (Indian Limitation Act), Schedule II, Article 179—Suspension of execution proceedings—Revival of pending execution suspended not by act or default of decree-holder.*

On 24th August 1888 an application was made for execution of a decree, and on 18th December 1888 execution was allowed to proceed. On 29th November 1889 it was ordered that the case should be struck off the file and the record transferred to the Court of the Collector for execution. On 23rd December an order was made that as the decree-holder had not made a deposit on account of the transfer to the Collector, "therefore in default of prosecution on the part of the decree-holder the record be not sent to the Collector's Court." On 15th February 1889 an appeal had been preferred to the High Court from the order of 18th December 1888 allowing execution to proceed, and the High Court reversed that order on 7th January 1890, but on appeal to the Privy Council the order allowing execution was restored on

*Present* :—Lord DAVEY, Lord ROBERTSON and SIR ARTHUR WILSON.

12th December 1894. *Held* by the Judicial Committee (affirming the decision of the High Court) that an application for execution made on 23rd November 1897 was one to revive and carry through a pending execution suspended by no act or default of the decree-holder, and not an application to initiate a new one, and was therefore not barred by limitation.

The order of 29th November 1889 was one in aid of execution and that of 23rd December was in no sense a final order: if the appeal from the order of 18th December 1888 and the proceedings up to the order of the Privy Council of 12th December 1894 had not intervened there was nothing in its terms to preclude the decree-holder from coming again to the Court and, after satisfying the conditions indicated in the order, obtaining the transmission of the case to the Collector's Court.

**APPEAL** from a judgment and decree (July 16th, 1900) of the High Court at Allahabad, by which a judgment and decree (May 13th, 1899) of the Subordinate Judge of Allahabad was reversed.

The main question on this appeal was whether an application made on 23rd November 1897 to execute a decree passed on 11th April 1883 was barred by limitation.

The facts of the case are stated in their Lordships' judgment, and in the judgment of the High Court (KNOX, Officiating C.J. and BLAIR, J.), appealed from, which is reported in I. L. R., 23 All., 13.

Mr. *DeGruyther* for the appellant contended that the application to execute the decree was barred by lapse of time. It was a fresh application for execution of a decree, the last proceeding in execution of which had taken place on 29th November or 23rd December 1889. The last application for execution, therefore, came to an end on one or other of those dates. On the former date the case was ordered to be struck off the file and transferred to the Collector for execution, and on 23rd December 1889, the decree-holder not having made the deposit necessary for the transfer of the case, it was ordered "that in default of prosecution on the part of the decree-holder the record be not sent to the Collector." It was submitted that any further execution could only be obtained by a fresh application, and consequently the present application for execution made on 23rd November 1897 was barred by article 179, Schedule II of Act XV of 1877. The High Court were in error in deciding that the decree-holder

1905-

QAMAR-UD-  
DIN  
AHMAD  
v.  
JAWAHIR  
LAL.



1905

QAMAR-UD-  
DIN  
AHMAD  
v.  
JAWAHIR  
LAL.

was not in default, and that the delay that had taken place in applying for execution was not due to his negligence. They were also wrong in doubting the regularity of the order of 23rd December 1889 which, it was submitted, was not an interpolation or a forgery as the High Court suggested, but was made in due course of proceeding, and was an order known to the decree-holder. Reference was made to the Civil Procedure Code (Act XIV of 1882), section 647: the Limitation Act (XV of 1877), section 14, clause 2 and schedule II, article 179; and *Thakur Prasad v. Fakir-ul-lah* (1).

Mr. G. E. A. Ross for the respondents was not heard.

1905, March 24th—The judgment of their Lordships was delivered by SIR ARTHUR WILSON:—

The question raised by this appeal is whether certain proceedings in execution were barred by limitation as falling under article 179 of the second schedule to the Indian Limitation Act, 1877.

The material facts are few. On the 11th April 1883 Thakur Prasad, now represented by the respondents, obtained a decree upon a mortgage bond against the appellant. On the 29th August 1885 the decree-holder applied for execution, and on the 5th January 1886 that application was struck off the list by consent.

On the 24th August 1888 a second application for execution was made, and notwithstanding objections by the judgment-debtor, an order was made on the 18th December 1888 that the execution should proceed; and other steps followed, which appear on the order sheet. On the 29th November 1889 an order was made to the effect that, the property to be sold being ancestral, the case should be struck off the file, and the papers transferred to the Court of the Collector for the completion of the sale proceedings.

On the 23rd December 1889 there appears another order:—"In this case the decree-holder has not up to this date deposited Re. 1 on account of the order for sale by auction, and the copy of the decree to be sent to the Collector's Court. Therefore it is ordered that in default of prosecution on the part of

the decree-holder the record be not sent to the Collector's Court for taking the sale proceedings."

While these execution proceedings were pending, and at an early stage of their progress, on the 15th February 1889, an appeal was brought in the High Court against the original order of the 18th December 1888, under which the execution proceeded. The High Court, on the 7th January 1890, allowed that appeal on grounds which it is not now necessary to notice. On a further appeal to Her late Majesty in Council that decision of the High Court was reversed, the judgment of this Board being delivered on 24th November 1894 and embodied in an Order in Council of the 12th December 1894.

The application now in question was made on the 23rd November 1897. It asked by its terms that the sums due by virtue of the decree be "realized by sale of the mortgaged property," that "the execution case instituted on the 24th August 1888, which was sent to the Collector's Court on the 23rd December 1887" (this ought apparently to be 29th November 1889) "may be revived, and it may be sent to the Collector's Court, and by issue of a warrant of arrest."

It was objected that this application was barred by limitation, and the Subordinate Judge gave effect to the objection. The High Court, on appeal, dissented from this view, holding that the present application is "not a fresh application, but one praying the Court to revive the suspended order and permit it to be pushed through to completion." The appeal now before their Lordships is against that decision of the High Court.

The learned Counsel for the appellant contended that the former execution proceedings were finally disposed of and came to an end by the orders of the 29th November and 23rd December 1889, or one of them, and that the present application could only be regarded as one for a fresh execution, and therefore was barred under article 179. But the first of those orders was in aid of the execution. As to the second order there is nothing to show on whose application or in whose presence or under what circumstances it was made, and the learned Judges of the High Court have shown reasons for doubting its regularity. But assuming it to have been perfectly regular,

1905

QAMAR-UD-  
DIN  
AHMAD  
c.  
JAWAHIR  
LAL,

1905

QAMAR-UD-  
DIN  
AHMAD  
v.  
JAWAHIR  
LAL.

it was in no sense a final order. If the appeal to the High Court against those proceedings and the judgment of that Court and the appeal to Her Majesty in Council rendered necessary by that judgment had not intervened to interrupt the course of the execution, there was nothing in the terms of the order to preclude the decree-holder from coming again to the Court, satisfying the conditions indicated in the order, and obtaining the transmission of the case to the Collector's Court.

Their Lordships are of opinion that the execution proceedings commenced by the petition of the 24th August 1888 were never finally disposed of and that the application now under consideration was in substance, as well as in form, an application to revive and carry through a pending execution, suspended by no act or default of the decree-holder, and not an application to initiate a new one.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the costs.

*Appeal dismissed.*

Solicitors for the appellant—Messrs. *Pyke and Parrott*.

Solicitors for the respondents—Messrs. *Barrow, Rogers and Nevill*.

J. V. W.

1904  
August 11.

## APPELLATE CIVIL.

*Before Mr. Justice Knox, Acting Chief Justice, and Mr. Justice Aikman.*

RAJ NARAIN MITTAR (PLAINTIFF) v. BUDH SEN AND OTHERS  
(DEFENDANTS).\*

*Landholder and tenant—Rights in respect of building sites in the abadi—Customary law—Wajib-ul-arz—Unauthorized building—Acquiescence.*

The plaintiff, who was the receiver of the estate of a minor, situate in the district of Bulandshahr, resided at Calcutta, the property in Bulandshahr being managed through a karinda whose authority was strictly limited by a power-of-attorney. In 1894, two tenants of the village Sankhni, in which the minor was a co-sharer, sold their house in the abadi by means of a registered sale-deed. The vendee was put into possession, and proceeded,

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\* Second Appeal No. 1047 of 1902, from a decree of F. W. Brownrigg, Esq., District Judge of Aligarh, dated the 29th of August 1902, confirming a decree of Babu Hira Lal Singh, Munsif of Bulandshahr, dated the 2nd of June 1902.

1904

RAJ  
NARAIN  
MITTAR  
v.  
BUDH  
SEN.

between 1894 and 1896, to spend a considerable sum of money in building a pacca house on the site of the house so purchased. It did not appear that he made any inquiries from the karinda of the plaintiff as to his rights or asked for any permission to build the house. On the other hand the karinda took no steps to interfere with the building. The *wajib-ul-arz* of the penultimate settlement of the village contained these provisions:—"Without our consent nobody can settle in any place possessed by us (*i.e.* the zamindars)," and again:—"A ryot occupying any house cannot be turned out of it by anybody so long as he lives in it, but he is not empowered to alienate the site. He can remove and sell the materials of the building constructed by him." In January 1902 the plaintiff brought the present suit asking that the principal defendant (the purchaser) might be ordered to remove the materials of the house erected by him within a time to be fixed by the Court, failing which they might be declared to be the property of the plaintiff.

*Held* by AIKMAN, J., that the conduct of the plaintiff's karinda under the circumstances amounted to an acquiescence in the acts of the principal defendant and was binding on his principal, the plaintiff. *Ramsden v. Dyson* (1) and *Sri Girdhariji Maharaj v. Chote Lal* (2), referred to.

*Per* KNOX, ACTING C.J., *Contra*.—The principal defendants, vendors, had no right to sell anything more than the materials of their house; no title to the site passed to the purchasers, and under the circumstances the inaction of a karinda whose authority was limited could not be taken to bind the plaintiff. *Chhajju Singh v. Kankia* (3), *Sri Girdhariji Maharaj v. Chote Lal* (2), and *Ramsden v. Dyson* (1), referred to.

THE facts of this case sufficiently appear from the judgments.

Babu Jogindro Nath Chaudhri and Dr. Satish Chandra Banerji, for the appellant.

Pandit Sundar Lal, for the respondents.

AIKMAN, J.—The plaintiff, who is appellant here, is the receiver of an estate in the Bulandshahr district. The plaintiff sets forth that on the 24th February 1894, the second defendant, Inayat Beg, along with Musammat Mendo, deceased, now represented by the third defendant, Musammat Majidan, sold a house in Sankhni to the first defendant, Budh Sen, who has built a masonry house on the site of the purchased house, and that according to law and justice the sale and purchase were illegal and detrimental to the plaintiff's zamindari right. The plaintiff asks to be put in possession of this masonry house. In the alternative he asks that the defendant may be ordered to remove the materials of the house within a time to be fixed by the Court.

(1) (1865) L. R., 1 E. and I. A., 129. (2) (1893) I. L. R., 20 All., 248.

(3) Weekly Notes, 1881, p. 114.

1904

RAJ  
NARAIN  
MITTAR  
v.  
BUDH  
SEN.

Amongst other pleas put forward by the answering defendant, Budh Sen, he alleged that he had built the new house nine years previously, that the plaintiff had acquiesced in the construction, that Sankhni is not a village but a town, that the inhabitants thereof were owners of their respective houses, and that it had always been the custom among the residents to make transfers of their houses.

The Court of first instance dismissed the suit. The plaintiff appealed. His appeal was dismissed by the learned District Judge, and he comes here in second appeal.

Reliance is placed on paragraph 2 of a wazib-ul-arz framed at the penultimate settlement in 1870. The learned Judge says:—"No such record was framed for this district at the last settlement." It is not clear what is meant by this. Possibly what the learned Judge means is that no similar provision is to be found in the village administration paper prepared at the last settlement. The paragraph relied on begins as follows:—"Without any [our?] consent nobody can settle in any place possessed by us." This is, no doubt, intended to prevent strangers settling in the village without the zamindar's permission. With reference to this, it has to be borne in mind that the answering defendant is not a stranger, but a resident of Sankhni.

The paragraph proceeds:—"A ryot occupying any house cannot be turned out of it by anybody so long as he lives in it, but he is not empowered to alienate the *site*. He can remove and sell materials of the building constructed by him."

The answering defendant does not claim to have acquired any proprietary title to the site; he does not dispute the plaintiff's right to recover ground-rent for the site, and this is all the learned Judge has held the plaintiff to be entitled to.

As I read the clause relied on by the plaintiff, it does not prohibit the transfer of a house by one resident of the village to another.

The learned Judge finds that from 1870 onwards sales and mortgages of house property have been going on uninterruptedly in Sankhni and have never been objected to before. For the appellant reliance is placed on a passage in the judgment in the



case of *Sri Girdhariji Maharaj v. Chote Lal* (1). The passage relied on is an *obiter dictum* which has been dissented from by more than one Judge of this Court.

There is, I think, no manner of doubt that the defendant, Budh Sen, believed he had acquired a good title to the house and that acting on this belief he expended a large sum of money "variously put at anything from Rs. 6,000 to Rs. 10,000." The learned Judge observes:—"There is no doubt whatever that the erection of this fine house was acquiesced in by the plaintiff." To this finding no objection is taken in the memorandum of appeal to this Court. It is merely contended that the fact of the zamindar not objecting to the erection of the house will not affect his right to recover possession of the site by the ejectment of the defendants.

The defendant at great expense reconstructed the house he had bought, believing that he had a right to do so. The plaintiff or his agent must have known that the defendant was spending his money in this belief, and yet allowed him to do so. Years after the house is finished, the plaintiff, without making any attempt to explain the delay, comes to Court and sues for possession of the house or for its removal.

In the well-known case of *Ramsden v. Dyson* (2), the Lord Chancellor says at p. 140:—"If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right and leave him to persevere in his error, a Court of Equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title, and that it would be dishonest in me to remain wilfully passive on such an occasion in order afterwards to profit by the mistake which I might have prevented."

Applying the principle embodied in these observations to the facts of the present case, I have no hesitation in coming to the conclusion that the plaintiff is not entitled to either of the reliefs he asks for, and that his suit has been rightly dismissed.

(1) (1895) I. L. R., 20 All., 248.

(2) (1865) L. R., 1 E. and I. A., 129.

1904

RAJ  
NABAIN  
MITTAR  
v.  
BUDH  
SEN.

1904

RAJ  
NARAIN  
MITTAR  
v.  
BUDH  
SEN.

I would dismiss this appeal with costs.

KNOX, ACTING C.J.—The questions raised in this second appeal are questions of no small importance.

They relate to the rights of landholders in village homestead land, and how far those rights may be affected by omission on the part of a local agent to assert his principal's rights when infringed by any act of the tenant.

The lower appellate Court in its judgment sets out the facts, and they may be taken to be as follows :—

The plaintiff appellant is receiver of the estate of one Lalla Babu, one of the landlords of the village Sankhni. The learned Judge tells us that “ the homestead of this village lies about two miles from the town of Jahangirabad and has itself many urban properties. Several wealthy people live there, and it has far outstripped the ordinary incidents of a merely rural hamlet.” This last fact stated by the Judge is open to question. The only authority I can find for it is the statement made in paragraph 9 of the written reply, which runs as follows :—“ Sankhni is not a village, but a town. The zamindar has no right to the abadi of it. It has always been the custom among the residents of the village to make transfers, &c.” The point was not put in issue, and I find it difficult therefore to apprehend and to appraise the precise nature and force of the learned Judge's remark. It is easy to write *currente calamo* about a village as having far outstripped the ordinary incidents of a merely rural hamlet, but when we have to consider rights of property, something more definite is required, showing in what direction and to what extent the incidents of a merely rural hamlet have been outstripped.

There is the tangible fact that in 1870 it was treated by the Settlement Officer as an ordinary mahal, and the record-of-rights then drawn up was just such as would be drawn up for any ordinary mahal. I therefore prefer to deal with Sankhni as an ordinary mahal governed to all intents and purposes by the laws and customs which govern mahals in these Provinces. It is for those who wish to take it out of this category, or to maintain that it is governed by special local customs, to establish such exceptions to the ordinary rule.

1904

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RAJ  
NARAIN  
MITTAR  
v.  
BUDH  
SEN.

To resume the facts. The plaintiff asks (1) to be put into proprietary possession of a certain house of which Budh Sen is in occupation; (2) that the said defendant, Budh Sen, Baqqal, be ordered to remove the materials of the house within a time to be fixed by the Court; (3) that if he fail to do so, his right so to remove them may be declared extinct.

The house in dispute originally belonged to the respondents, Inayat Beg and Musammat Majidan, and to their predecessor in interest. They have been mortgaging it for many years to various persons, and eventually they have sold it to Budh Sen, respondent, under a sale-deed, dated the 22nd of February 1894, some six years or more before the present suit was instituted.

"Budh Sen" the learned Judge finds, "set about renovating the house. He spent a lot of money on it" until the value, according to a commissioner (the Tahsildar) appointed in the case for the purpose of ascertaining its value, is estimated at Rs. 6,000. While this renovation was being carried out the plaintiff's karinda "looked on and never said a word." "He," the learned Judge adds, "practically acquiesced in the improvements made by Budh Sen." It is not easy to apprehend to what this practical acquiescence amounts in fact; it is an acquiescence gathered from either the act or the omission of the karinda, it is not said which, and the karinda is karinda to a principal who was at the time apparently a minor of very tender years (*vide* paragraph 5 of the plaint). He was a minor in 1889 and was still a minor in 1902. Apparently he is still a minor. The receiver of his estate is a barrister residing in Calcutta, and the karinda is a person appointed by the barrister under a special power-of-attorney which is on the record. The vendee apparently finished his building by 1896.

The situation then briefly is this. Certain cultivators have sold a house situate in the homestead of Sankhni to a bania. The bania has spent sums of money on it. The land-holder is a minor, and the karinda of a receiver of his estate appointed by the Court by act or omission has practically acquiesced. Can the land-holder ask to be put in possession of the house or ask that the materials be removed?

1904

RAJ  
NARAIN  
MITTARv.  
BUDH  
SEN.

In considering this question it is necessary to see first what are the generally recognised powers of a landholder in these Provinces over homestead land in a village.

I find on turning to the Land Systems of British India by B. H. Baden-Powell, C.I.E., an officer who had great experience in these matters both as a Collector and afterwards as a Judge of the Chief Court of the Punjab, the following, which accords with what my observation and experience lead me to believe is the custom ordinarily prevalent in the case of village homesteads in these Provinces. The following extract is from page 154 of his work :—

“The village site (he is writing of homesteads in the United Provinces) is owned by the proprietary body, who allow residences to—

- (1) the ‘kamin,’ the artisan class, farm labourers and menials.
- (2) The tenantry.
- (3) The traders, money-lenders, &c.

These probably pay some small dues according to custom, and if they leave the village may have no right to dispose of the site and only in some cases to remove the roof timbers and other material.” Again, at page 107, I find :—“The site on which the village habitations, the tank, the graveyard and the cattle-stand are is claimed by them, and the others live in and use it only by permission, perhaps on payment of small dues to the proprietary body.”

This Court in the Full Bench case *Chajju Singh v. Kanhai* (1) laid down that “the zamindars of a village are as a rule and presumably the owners of all the house sites in their villages and a house left unoccupied by a tenant lapses to the landlord in the absence of heirs or other lawful assignees of the last occupant.”

The terms recorded in the *wajib-ul-arz* in this very village so late as 1870 point to this custom being known and recognised in Sankhni.

They are as follows :—

“Paragraph 2. Mention of homestead

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1904

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RAJ  
NARAIN  
MITTAR  
c.  
BUDH  
SEN.

“Without our consent nobody can settle in any place possessed by us. A ryot occupying any house cannot be turned out of it by anybody so long as he lives in it, but he is not empowered to alienate the site. He can remove and sell the materials of the building constructed by him.”

Assuming this to be a correct representation of the rights of land-holders in any normal village in these provinces, and remembering the force which attaches to a wajib-ul-arz, I hold that the “sales and mortgages of house property” which have, according to the Judge, been going on uninterruptedly in Sankhni for many years back from 1870 onwards, are of no value as establishing a custom to the contrary. They are at the best only evidence of so many special contracts in so many specific instances of transfer and nothing more.

The rights of tenants to sell houses which they had built for their occupation in a village homestead upon permission given by the zamindar was considered by a Bench of this Court in *Sri Girdhariji Maharaj v. Chote Lal* (1). In that case one Chote Lal had purchased at auction sale under a decree the rights of occupiers of a house in the abadi, and the zamindar sued for possession. This Court, relying upon what it held to be “the general and well-known custom of these Provinces—a custom so well established that it might be treated as the common law of the Provinces,” held that “a person, agriculturist or agricultural tenant, who is allowed by a zamindar to build a house for his occupation in the abadi, obtains, if there is no special contract to the contrary, a mere right to use that house for himself and his family so long as he maintains the house and does not abandon it by leaving the village.” They added that as such occupier, he has, unless he has obtained by special grant from the zamindar, no interest which he can sell by private sale, except his interest in the timber, roofing and wood-work of the house. They accordingly granted the zamindar or land-holder a decree declaring, (1) that “the occupiers of the house had no right except to the timber, the wood-work and the roofing which could be sold in execution of a decree against them, (2) that a right to occupy the house was not transferable by sale either private or in execution of a decree,” and also a decree that the

1) (1898) I. L. R., 20 All., 248.



1904

RAJ  
NARAIN  
MITTAR  
v.  
BUDH  
SEN.

plaintiff be put in possession of the site claimed. Chote Lal was allowed thirty days to remove such of the materials of the house as were not part of the land, and it was added that he could not remove the walls of the house if they were constructed of soil belonging to the village.

The attention of the learned Judge was called to this ruling, but he refused to follow it, holding that the deeds of sale and transfer which had been filed showed that Sankhni was not a small country hamlet to which any unwritten common law of the country can be held to apply. I am unable to follow the learned Judge in this reasoning. The *wajib-ul-arz* testifies to the contrary.

He, however, further holds that the appellant is barred by acquiescence from claiming this relief and that it would be inequitable to grant it. This view is challenged by the appellant.

It will be necessary to examine somewhat closely the conduct of the plaintiff, or rather that of his agent, in order to decide whether that conduct in the present case does amount to such acquiescence as would estop the plaintiff from the relief he claims, and in connection with this it will be well to bear in mind what has been laid down by Lord Cranworth in the case of *Ramsden v. Dyson* (1):—"If indeed, the principal knows that persons dealing with his agent have so dealt in consequence of their believing that all statements made by him had been warranted by the principal, and knowing this allows the persons so dealing to expend money in the belief that the agent had an authority which in fact he had not, it may be that in such a case a Court of Equity would not allow the principal afterwards to set up want of authority in the agent. But this equity, whenever it exists, depends absolutely on the fact that the knowledge on which it rests can be brought home to the principal."

In the present case I cannot lay my finger upon any act of the agent. All that I can find is that while Budh Sen spent the money the agent looked on and never said a word. There is nothing to show that Budh Sen ever inquired or had any reason to believe that this agent had authority to allow his principal's

(1) (1865) L. R., 1 E. and I. A., 129 at p. 158.

1904

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RAJ  
NABAYN  
MITTAR  
v.  
BUDH  
SEN.

rights to be given away or that any statement of the agent (no such statement is set up) was warranted by the principal.

The powers which were conferred upon this agent have been set out in his power of attorney. I have had this document read over to me. It is a carefully prepared and guarded document, and I can find nothing in it on which to base an inference that the agent had any power to give away any rights of his principal; indeed, there is one clause which expressly sets out that the principal will not be responsible for any acts of the agent in excess of the power conferred by the deed.

To hold that the property of or rights in the property of an absentee minor could be given away by an agent looking on and allowing a tenant to spend money is a step I cannot bring myself to take.

I regret exceedingly to find myself differing from my learned brother. I can find no ground on which to base the inference that the plaintiff must have known that the defendant was spending money in the belief that he had a right to do so. The plaintiff resides in Calcutta, and it is not shown that he ever came near Sankhni. The probabilities are the other way. There is nothing to show that any news of the defendant's act was ever conveyed to him. If we consider probabilities, they lean quite as much to the defendant stealing a march upon an absentee landlord, but I prefer to base my judgment upon the facts. Upon them I am constrained to hold—

1st.—That it has not been shown that the rights of land-holders in the homestead in mauza Sankhni differ in any respect from what are the general and customary rights prevalent in these Provinces.

2nd.—That the respondents, Inayat Beg and Musammat Majidan, could not transfer to the respondent, Budh Sen, anything further than the materials, &c., of the house which Inayat Beg and Musammat Majidan occupied as tenants.

3rd.—That it has not been shown that the land-holder knew of or acquiesced in the building erected by Budh Sen,

1904

RAJ  
NABAIN  
MITTAR  
v.  
BUDH  
SEN.

4th. — That the land-holder's agent had no authority to do any act signifying such acquiescence on his principal's behalf.

For these reasons I would allow the appeal, but, as the judgment of the Court must be that of my learned brother, I need not set out what in my opinion should be the relief granted.

BY THE COURT:—

The order of the Court is that the appeal be dismissed with costs.

*Appeal dismissed.*

1904  
November 5.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*

RAJ BAHADUR (DEFENDANT) v. BHARAT SINGH (PLAINTIFF.)\*

*Suit to recover profits of sir land in an undivided mahal—Limitation—Adverse possession.*

In a suit to recover his share of the profits of certain sir land appertaining to an undivided mahal the plaintiff had not been in receipt of profits in respect of the sir land in suit for more than twelve years; but he and his predecessor in title had been in receipt of their shares of the rents and profits of the undivided mahal, other than of the particular sir land in question, continuously.

*Held* that the mahal being undivided, the defendant's possession of the sir land, the profits of which were claimed, had never really been possession hostile to the plaintiff, and the suit was therefore not barred by limitation.

IN the suit out of which this appeal arose the plaintiff as a co-sharer in an undivided mahal claimed to recover a share in the profits of certain sir land appertaining to the mahal. The suit was resisted upon two grounds, amongst others, one being that the suit was barred by the doctrine of *res judicata*, the other that the defendant had been in adverse proprietary possession of the sir land, the profits of which were claimed, for more than twelve years. The suit was originally dismissed by the Court of first instance on a preliminary point, but that decision was overruled on appeal and the case remanded under section 562 of the Code of Civil Procedure for trial on the merits. The Court of first instance (Assistant Collector of Allahabad) then re-heard the suit and decreed the plaintiff's claim. The

\* Second Appeal No. 1132 of 1902, from a decree of C. Rustomji, Esq., District Judge of Allahabad, dated the 18th of September 1902, modifying a decree of Maulvi Syed Ala-ul-Hasan, Assistant Collector of Allahabad, dated the 9th of May 1902.

1904

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RAJ  
RAHADUR  
v.  
BHARAT  
SINGH.

defendant appealed, and in this appeal two questions only were argued before the District Judge, namely, the question of *res judicata*, and the actual amount of profits to which the plaintiff was entitled. The lower appellate Court slightly reduced the amount given to the plaintiff by the decree of the first Court, but otherwise dismissed the appeal. The defendant appealed to the High Court.

Babu *Jogindro Nath Chaudhri* and Dr. *Satish Chandra Banerji*, for the appellant.

Pandit *Moti Lal Nehru* and Babu *Durga Charan Banerji*, for the respondent.

STANLEY, C. J., and BANERJI, J.—The claim of the plaintiff, which is the subject matter of this appeal, was made by him as a co-sharer in an undivided mahal to recover a share of the profits of some *sir* land appertaining to the mahal, and which appears to have been in the occupation of the defendant for a number of years. Two questions have been raised in the appeal; the first of which is that the claim is barred by the rule of *res judicata*, and the second is that it is barred by the Statute of Limitation. It appears that there were two pattis of 4 annas each, one called patti Surat Singh and the other, the patti in dispute, Sheobodh Singh. The defendant's grandfather bought the 4 annas of Surat Singh in the year 1873 and became entitled to the entire of that patti. He was obliged to institute suits for the recovery of the *sir* lands appertaining to that patti, and in some at least of those suits Lahori Singh, the predecessor in title of the plaintiff, was a party. It is contended on behalf of the appellants that, inasmuch as in some of those suits in which the title of the *sir* land was questioned the predecessor in title of the present plaintiff was a party, and as those suits were decided in favour of the grandfather of the present defendant, the title to the *sir* land now in dispute was determined, and therefore the matter is *res judicata*. The learned vakil for the appellant, however, was practically forced to abandon this contention. He did not seriously contend that the rule applied, and it seems to us he could not do so, having regard to the fact that the former litigation had regard to patti Surat Singh and was not concerned with patti Sheobodh Singh.

1904

RAJ  
BAHADURv.  
BHARAT  
SINGH.

This is a complete answer to the contention. The appeal so far as regards this point therefore fails.

The next contention is that the claim of the plaintiff is barred by the Statute of Limitation, inasmuch as it has not been shown that within a period of twelve years before the institution of the suit the plaintiff was either in possession or in receipt of any of the profits of the sir lands in dispute. With regard to this contention we are of opinion that the decisions of the Courts below were correct, and for this reason. The mahal is an undivided mahal. The plaintiff has been in receipt of his share of the profits of the mahal, with the exception of the sir land in dispute, since the date of his purchase, six years ago, and prior to that his predecessor in title was in receipt of those rents and profits. It is, therefore, not a case in which the plaintiff has been excluded from all participation in the rents and profits. It is not a case in which he relies upon merely a paper title, and, therefore, as it seems to us, some of the cases which have been relied upon by the appellants do not apply. It does not appear that the defendant or his predecessors in title ever claimed or set up an adverse title to the sir land in dispute to the exclusion of the respondent, or that he ever repudiated the right of the respondent or his predecessors in title to enjoy the profits or the possession of their share of the sir land. This being so, it seems to us that the possession of the sir land by the defendant must be regarded as a possession not merely for his own benefit but for the benefit also of the co-sharers. The possession, in fact, of the defendant has never been hostile possession. This being so, we are of opinion that the decisions arrived at by the Courts below were perfectly correct and that the appeal must be dismissed. We therefore dismiss it with costs.

*Appeal dismissed.*



## FULL BENCH.

1904  
November 19.

*Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Blair  
and Mr. Justice Aikman.*

MADARI AND OTHERS (PLAINTIFFS) v. BALDEO PRASAD  
AND OTHERS (DEFENDANTS).\*

*Construction of document—Mortgage—Interest—Possession—Liability  
of mortgagee in possession to account for rents and profits.*

The defendants were in possession of two shops under a mortgage from the plaintiffs. The plaintiffs sought to recover possession alleging that the mortgage debt had been satisfied by the rents and profits of the shops. The defendants pleaded, *inter alia*, that they were not liable under the terms of the mortgage to render an account of the rent realized.

The material portion of the mortgage was in the following terms:—

"We have borrowed nine hundred and fifty-one (951) rupees in cash of the Nana Shahi coin on account thereof and paid the same to Punno and Chunnu of Saugor. Interest shall be paid on this money at Re. 1 per cent. Rupees 9-3-6 shall be paid for every month as the sum remaining after deduction, the promised time being five years. Should we pay the money, within five years, we shall get the shops. We shall pay the expenses relating to the two shops. Should they be paid by the mortgagees, we shall pay them the same together with interest without any objection.

*Held*, on a construction of the mortgage, by STANLEY, C.J., and BLAIR, J., AIKMAN, J., *dissentiente*, that, there being no contract to the contrary, the mortgagees, if they got possession, which they did, were bound to account for the rents and profits received by them whilst in such possession. There was no agreement that the mortgagees should take the rents and profits without accounting in addition to the stipulated interest.

In this case the plaintiffs, mortgagors or representatives of mortgagors, sued to recover from the mortgagees or their representatives, two shops which had been mortgaged to them in January 1872. The plaintiffs alleged that the defendants or their predecessors in interest had been in possession of the shops ever since the execution of the mortgage and that the mortgage debt had been more than satisfied by the rents and profits of the shops received by the defendants, and they claimed an additional sum of Rs. 300, or whatever a settlement of accounts might show as due by the defendants. The defendants *inter alia* pleaded that they were not under the terms of

\* Second Appeal No. 98 of 1903, from the decree of Pandit Ram Autar Pande, District Judge of Jhansi, dated the 2nd of October 1902, modifying a decree of Mr. Jafar Husain, Subordinate Judge of Jhansi, dated the 7th of July 1902.

1904

MADARI

v.

BALDEO  
PRASAD.

the mortgage-deed liable to account for the rents and profits, but took them *quid* interest in addition to the stipulated interest of 1 per cent. per mensem. The Court of first instance (Subordinate Judge of Jhansi) gave the plaintiffs a decree for redemption upon payment of Rs. 1,898-12-0. On appeal by the plaintiffs the District Judge reduced the amounts payable by the plaintiffs for redemption to Rs. 1,127-13-0, but otherwise affirmed the decision of the first Court. The plaintiffs thereupon appealed to the High Court.

Babu *Jogindro Nath Chaudhri* and The Hon'ble Pandit *Madan Mohan Malaviya*, for the appellants.

Pandit *Sundar Lal*, for the respondents.

AIKMAN, J.—This appeal arises out of a suit brought by the plaintiffs, who are the appellants here, for the redemption of a mortgage executed on the 11th of January 1872. The plaintiffs' case as set out in the plaint was that the whole of the mortgage debt had been discharged by the usufruct of the property and that a balance was due to them. The Court of first instance decreed the plaintiffs' claim on payment of a certain sum. Against this decision the plaintiffs appealed. The first ground in the memorandum of appeal to the lower appellate Court is that the finding of the lower Court that it was intended by the agreement of the parties that the mortgagees would take the rents in addition to the interest is wrong. On this plea the finding of the learned District Judge was against the plaintiffs' contention. He reduced somewhat the amount to be paid by the plaintiffs for redemption; in other respects he affirmed the decree of the Court of first instance.

The plaintiffs come here in second appeal. The only ground argued before us is the fourth ground in the memorandum of appeal to this Court, which runs as follows:—"Because the lower Courts are wrong in allowing to the mortgagee interest in addition to the rents of the shops received by him." The decision of this question depends on the interpretation of the mortgage-deed. This is an inartistically drawn and obscurely worded document, and different opinions may be formed as to what it means. The plaintiffs came into court on the allegation that under the mortgage, the mortgagees were to be put into

1904

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MADARI  
v.  
BALDEO  
PRASAD.

possession and enjoyment of the shops. The deed does not distinctly say that the mortgagees were to be put into possession of the mortgaged property, though this may be inferred from the provision about the mortgagors getting back the property when the money was repaid and the further provision about the mortgagors recouping the mortgagees for any outlay they might make on the property. Now what we have to decide is what the parties meant by the contract contained in the deed of the 11th of January 1872.

The presiding officer of the Courts below both considered the terms of this deed, and they agreed in holding that the intention of the parties was that the interest should be paid by the mortgagors in addition to such rents as the mortgagees could get from the shops. I cannot of course pretend to so intimate a knowledge of the vernacular as is possessed by the presiding officers of the Courts below, but I have carefully studied the terms of the deed, and in my opinion the interpretation put upon the deed by the Courts below is right. There is one expression used in the deed, namely, "*mahin war Rs. 9-3-6 chhut jake pakke dewen*" which I think never could have been used by the mortgagors if it had been the intention that the rents of the shops were to be taken into account and set off against the interest payable monthly. As pointed out by the learned District Judge, even with the rents thrown in the interest is not of an unusually exorbitant nature. I should have thought that an argument in favour of the appellants might have been based on the words *chhut jake* were it not admitted that this expression only refers to a deduction of half an anna in the rupee which, it appears, it was the custom in Gwalior to make and not to any deduction on account of rents. After giving my best consideration to the terms of the document I am of opinion that the meaning put upon it by the Courts below correctly represents the intention of the parties to the contract.

For these reasons I would affirm the decree of the Court below and dismiss the appeal with costs.

STANLEY, C.J.—I am unable, with all deference, to agree in the views just expressed by my brother Aikman. It appears

1904

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MADARI  
v.  
BALDEO  
PRASAD.

to me manifest upon a perusal of the document which is the subject-matter of this appeal, that both the Courts below came to a wrong decision. The mortgage in question is not well expressed, but from the beginning to the end of the arguments in regard to its language I have failed to discover that there is any very great obscurity about it. The transaction seems to me to be one of a very simple nature and not to require very much skill to interpret, if we confine ourselves to the four corners of the document. In it there is a statement that the mortgagors are possessed of certain shops, that they have borrowed Rs. 951 of the Nana Shahi coin and that they will pay interest on that amount at 1 per cent. per mensem. Then follow the words, upon which a good deal of stress has been laid in the course of the argument, by which an undertaking is given by the mortgagors for the payment of interest, namely, an undertaking that they "will pay monthly Rs. 9-3-6 certain after remission." The meaning of the term "after remission" is that in the Gwalior State it is customary to make a slight reduction on the payment of interest. The Rs. 9-3-6 represents, therefore, the interest at Re. 1 per cent. after allowing this remission. Then follows the provision that the mortgagors will pay the money within five years and shall get back the shops. These are substantially the entire contents of the document. There is nothing whatever said in regard to possession. There is no provision in the document as regards the profits of the shops during the term of the mortgage. It is said that from the language used in the agreement it is to be implied that possession was to be given and that profits were to be taken and enjoyed by the mortgagees in addition to the interest. Such a construction of the instrument I am wholly unable to understand. The word which is relied upon in support of this contention is the word "*pakka*" which is found in the agreement for the payment of interest and which is accurately translated "certain." The mortgagors entered into an obligation to pay monthly Rs. 9-3-6 *certain*, i. e., without any deduction. How it can be gathered or inferred from this expression that it was the mere intention of the parties that the mortgagees, if they took possession, were to enjoy the profits in

1904

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MADARI  
v.  
BALDEO  
PRASAD.

addition to the interest passes my comprehension. Where a mortgage-deed is silent as to possession, and there is no agreement to the contrary, a mortgagee who takes possession takes also the obligation upon him to account for the rents and profits during the time he is in possession. That is the obligation which was cast upon the mortgagees here. As is stated in the plaint, the mortgagees were put into possession, and in the written statement this statement is admitted by the defendants respondents. Therefore we have it that the mortgagees undoubtedly went into possession and being in possession they are under the ordinary liability under which every mortgagee is, in the absence of express stipulation, to account for the rents and profits. The contention which has found favour with the lower Courts and also with my brother Aikman is expressed in the third paragraph of the further pleas in the written statement of the defendants and is in the following terms:—"In accordance with the conditions laid down in the mortgage-deed the defendants are not liable to render an account of the rent realized, and on this understanding the rate of interest mentioned in the mortgage-deed is only one rupee." Now, I have pointed out, there is no condition in the document that the mortgagees should not be liable for the rents realized by them. That being so, they must account for the rents and profits received by them during the time they have been in possession. I would, therefore, allow this appeal, set aside the decrees of the Court below in so far as they disallowed to the plaintiffs appellants credit for the profits which were received by the mortgagees whilst they were in possession, and I would direct an account to be taken of what those rents and profits amount to and set them off against the mortgage debt and give a decree as prayed. For this purpose it would be necessary to have a determination by the Court below of the amount of rents and profits so received.

BLAIR, J.—I have nothing to add to the judgment of the Chief Justice. In my view the mortgage is susceptible, upon ordinary principles of interpretation, of no other construction than that he has put upon it. If it were otherwise a wholesome rule would receive a serious, and, in my opinion, a

1904

MADARI  
v.  
BALDEO  
PRASAD.

dangerous blow. I also would pass the order proposed by the Chief Justice.

BY THE COURT.—Having regard to the decision of the majority of the Bench it now becomes necessary to remand an issue to the lower appellate Court under the provisions of section 566 of the Code of Civil Procedure. It will be necessary to have an account taken of what sum, if any, is due by the plaintiffs appellants to the defendants respondents in respect of the mortgage of the 11th January 1872. In the taking of that account credit must be given to the plaintiffs appellants for the rents and profits of the shops which have been received by the defendants whilst they have been in possession of the same, and credit should also be given to the defendants respondents in respect of repairs which have been carried out at their cost upon the shops in question. We therefore refer the above issue to the lower appellate Court for trial and the Court, if it thinks it necessary, will take any further evidence which may be considered necessary. We shall ask the Court to expedite the determination of this issue and to return its finding to us without delay. On return of the finding the parties will have the usual ten days for filing objections.

[In the end the case was compromised, and, on the 19th of November 1904, the Court directed that a decree should be prepared in the terms of the compromise.]

*Appeal decreed.*

1904

November 19.

## APPELLATE CIVIL.

*Before Mr. Justice Blair and Mr. Justice Banerji.*

BASA MAL AND OTHERS (PLAINTIFFS) v. GHAYAS-UD-DIN (DEFENDANT).  
*Land-holder and tenant—Rights of tenants in the village abadi—Wajib-ul-arz—Suit to remove building erected by tenant without permission of the zamindars.*

In the courtyard of a tenant lawfully in possession of a house site in the village abadi was "some sort of a thatched shed" used in fact by the tenant and other Muhammadans of the village for the purpose of religious observances. The wajib-ul-arz of the village provided that "no cultivator can

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\* Second Appeal No. 439 of 1904 from a decree of T. C. Piggott, Esq., District Judge of Moradabad, dated the 20th of March 1901, modifying a decree of Munshi Bakhtawar Lal, Munsif of Moradabad, dated the 5th of January 1898.



build a new 'house' outside the compound of his dwelling house without the permission of the zamindar. He is at liberty to do so in his compound."

*Held* that the tenant in question was not at liberty to convert the thatched shed in his courtyard into a "pacca" mosque without the permission of the zamindars.

The plaintiffs in this case were Hindu zamindars who had become by purchase the owners of a certain portion of the village of Bahpur. According to the findings of the lower appellate Courts there was, in this village, in the yard or "sehn" in front of a house of business (chaupal) belonging to a tenant of the name of Bahadur Khan, "some sort of thatched shed which was used by the Muhammadan tenants as a place of worship." In place of this thatched shed the defendant respondent, with other Muhammadan tenants of the village, erected or partially erected a "pacca" mosque, using for this purpose bricks taken from a mound of ruins belonging to the zamindars. The zamindars in the present suit sought to have the new building, so erected, as they alleged, without their permission, demolished, and also asked for compensation in respect of the bricks wrongfully taken by the defendants. Of the defendants some pleaded that they had acted with the plaintiffs' permission, others, that the mosque had merely been rebuilt on the original site and that they had not acted in contravention of the terms of the *wajib-ul-arz*: all denied that they had taken the plaintiffs' bricks. The *wajib-ul-arz*, it may be noted, contained the following provision:—"Chapter IV. General rights of the tenants. Section 3. The rights of the cultivators to build houses. No cultivator can build a new house outside the compound of his dwelling house without the zamindar's permission. He is at liberty to do so in his compound. When a cultivator absconds, the zamindar becomes the owner of his house. If he returns within six months, he gets his house. The zamindar has no right to forcibly eject any one." The Court of first instance (Munsif of Chandausi) gave the plaintiffs a decree for removal of the new mosque and for damages. On appeal, however, the District Judge of Moradabad modified the Munsif's decree and dismissed the plaintiffs' claim for demolition of the building. The plaintiffs appealed to the High Court.

1904

BASA MAL

v.  
GHAYAS-  
UD-DIN.

1904

BASA MAL  
v.  
GHAYAS-  
UD-DIN.

Mr. *W. K. Porter* and *Munshi Gokul Prasad*, for the appellants.

Messrs. *Abdul Majid* and *Abdul Raoof*, for the respondent.

BLAIR and BANERJI, JJ.—This suit was brought by certain Hindu zamindars for alleged misuse of land in the abadi let by them to a Muhammadan tenant. The allegation is that the land was originally let in the ordinary way for a dwelling house to a tenant. The finding is that there was a certain shed in the yard, the original use of which was not specified, that a number of Muhammadans with the consent of the tenant used to say their prayers there, that thereafter the tenant erected upon the site of the perishable shed a permanent building, which he himself describes as a mosque. The plaintiffs deny the right of the defendants to erect such a permanent building for religious purposes and pray for its demolition. In the defendants' defence they say that the place is a mosque and that the building is on the same site as the shed previously used for their religious observances. The Munsif decreed this part of the claim and the present respondent appealed to the District Judge. The District Judge allowed the appeal and dismissed the suit of the plaintiffs for the demolition of the building upon findings which in our opinion form an insufficient basis for his conclusion. He says that because there was an old shed used for religious observances, the old shed being of a frail and temporary kind, it could be replaced by a permanent mosque in which the same kind of observances should continue. He holds in effect that the defendants had title to erect such a building. It seems to us that he has not fully considered the nature of the tenure of land of a village site. It is held by tenants for dwelling houses and what are understood to be the ordinary appendages of a dwelling house. Indeed, it seems to us as impossible to contend that a tenant is entitled to erect a permanent mosque as that he is entitled to erect premises for some manufacture. The provisions of the *wajib-ul-arz* indicate with sufficient clearness that the land of the village site falls within the ordinary provisions relative to the abadi. It is expressly provided that no cultivator can build a house outside

the compound of his dwelling house without the zamindar's permission. He is at liberty to do so in his compound. When a cultivator absconds, the zamindar becomes the owner of his house, &c. This enables a tenant to build a dwelling house in his compound, but in the case of erection of a mosque, which would by dedication become vested in the religious body for whose observances it was used, the contention of the defendants is manifestly baseless in point of law. Every villager knows perfectly well the nature of his rights in the abadi, and it is impossible to believe that any tenant in an abadi could *bona fide* believe that he had a right to dedicate for ever to religious uses, to the detriment of the landlord, such portion of the abadi as he was allowed to occupy as a residential house. Nothing would establish the case of the defendant based on acquiescence except what appears to us the impossible finding that in erecting his permanent mosque he *bona fide* believed he was acting within his rights. We think, therefore, that the learned Judge was wrong and that the appeal must be decreed. We allow the appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance with costs in all Courts.

*Appeal decreed.*

## REVISIONAL CRIMINAL.

1904  
November 22

*Before Mr. Justice Aikman.*

QAYYUM ALI AND ANOTHER (APPLICANTS) v. FAIYAZ ALI AND OTHERS (OPPOSITE PARTIES).\*

*Criminal Procedure Code, section 439—Revision—Practice—Order of acquittal.*

Although the High Court has the power to interfere in revision with an original or appellate judgment of acquittal, it will ordinarily not do so.

THE parties to this application, who were more or less nearly related to each other, had a quarrel amongst themselves, in the course of which some slight personal violence was offered by one side to two of the members of the other. This led to a complaint under section 452 of the Indian Penal Code being

\* Criminal Revision No. 648 of 1904.

1904  
BASA MAL  
v.  
GHAYAS-  
UD-DIN.

1904

QAYYUM  
ALI  
v.  
FAIYAZ  
ALI.

filed by Qayyum Ali and Abdul Raoof against Faiyaz Ali and others. The case was tried by a Magistrate of the first class, who convicted the persons complained against under section 323 of the Code and sentenced them to fines, and also bound them over to keep the peace. On appeal the Sessions Judge of Aligarh came to the conclusion that the quarrel in which the case originated was a family quarrel of a very trivial kind, and, holding that the circumstances were such as to justify the application of section 95 of the Code, acquitted all the appellants. Against this order of acquittal the complainants applied in revision to the High Court.

The Assistant Government Advocate (Mr. Porter) raised a preliminary objection that, although, no doubt, the High Court, according to the Full Bench ruling in the case of *Emperor v. Balwant* (1), had power in revision to interfere with an order of acquittal, yet the practice of this and all the other High Courts was against such interference unless the matter was of an exceptional nature, which, it was submitted, certainly was not the case here. Reference was made to *In the matter of Sheikh Amin-ud-din* (2), *Emperor v. Madar Bakhsh* (3), *In re the Municipal Committee of Dacca v. Hingoo Raj* (4), *Heerabai v. Framji Bhikaji* (5), and *Thandavan v. Perianna* (6).

Babu Satya Chandra Mukerji (for whom Mr. M. L. Agarwala), for the applicants.

AIKMAN, J.—It has been held by this Court that, although it has the power to interfere in revision with an original or appellate judgment of acquittal, it will ordinarily not do so. Looking to the trivial character of this case, I am of opinion that it is not one in which I should interfere in revision. The application is dismissed.

(1) (1886) I. L. R., 9 All., 134.

(2) (1902) I. L. R., 24 All., 346.

(3) Weekly Notes, 1902, p. 200.

(4) (1882) I. L. R., 8 Calc., 895.

(5) (1890) I. L. R., 15 Bom., 349.

(6) (1890) I. L. R., 14 Mad., 363.

## APPELLATE CIVIL.

1904  
November 29.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*

GOPAL DAS (DEFENDANT) v. BADRI NATH AND OTHERS (PLAINTIFFS)

AND HARI DAS (DEFENDANT).\*

*Act No. IX of 1872 (Indian Contract Act), section 230—Undisclosed principal—Hindu law—Joint Hindu family—Contract made with managers of ancestral business—Parties to suit.*

Where a contract is entered into on behalf of a joint family business by the managing members of the firm in their own names it is not necessary that any members of the joint family other than those who entered into the contract should be parties to a suit brought thereon: the managing members are in the position of agents for undisclosed principals. *Bungsee Singh v. Soodist Lall* (1) and *Agacio v. Forbes* (2) followed.

IN the suit out of which this appeal arose, the plaintiffs sued as proprietors and managers of a firm trading under the style of Jwala Nath Kashi Ram, which carried on business in the city of Benares in silk, woollen and other goods. The suit was to recover from the defendants, who were zamindars living in Bengal, the price of goods supplied, together with interest. The Court of first instance (Additional Subordinate Judge of Benares) gave the plaintiffs a decree for the greater part of their claim, but against one of the defendants only. That defendant appealed to the High Court, urging there two main pleas, first, that the business of the plaintiffs being ancestral, the suit was bad for non-joinder of the other members of the plaintiffs' family, and secondly, that the Court below had improperly allowed interest on the amount due to the plaintiffs.

Babu *Jogindro Nath Chaudhri* and Babu *Beni Madhab Ghose*, for the appellant.

Pandit *Sundar Lal*, Dr. *Satish Chandra Banerji* and Babu *Lalit Mohan Banerji*, for the respondents.

STANLEY, C.J. and BANERJI, J.—This is a suit for the price of goods sold and delivered to the defendants. The plaintiffs sue as the proprietors and managers of a firm styled Jwala Nath Kashi Ram, who carry on business in the city of Benares

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\* First Appeal No. 243 of 1902, from a decree of Munshi Achal Behari, Additional Subordinate Judge of Benares, dated the 4th of September 1902.

(1) (1881) I. L. R., 7 Cal., 739. (2) (1861) 14 Moo., P. C., 160.

1904

GOPAL DAS

v.  
BADRI  
NATH.

in silk, woollen and other goods. The defendants are zamindars residing at Rangpur in Bengal. It appears that the business of the plaintiffs is an ancestral business and is carried on by the plaintiffs as managers of it. It was with the plaintiffs that the agreement for the sale of the goods, the price of which is sought to be recovered in this suit, was entered into.

Two points have been raised by the learned advocate for the appellant. It is not disputed that the goods were sold and delivered, but it is said that the business of the plaintiffs being an ancestral business and there being other members of the family interested in it who are not parties to the suit the suit must fail. The other point raised is in regard to the interest which has been allowed upon the price of the goods which were sold more than three years before the suit was instituted.

As to the first point it appears that the plaintiffs were the managers of the firm, that the transaction was entered into with them alone, and so far as it appears they never disclosed that any other person had any interest in the firm. This being so, it appears to us upon the authorities that the plaintiffs alone were justified in suing, inasmuch as they really acted in the transaction as agents for the members of the partnership who were not parties to the suit. The rule of law which governs a case such as this is stated in the judgment in the case of *Bungsee Singh v. Soodist Lall* (1). In that case a mortgage bond was executed in the name of the plaintiff alone, he being one member of a joint Hindu family. It was held there that he was entitled to sue as a person who contracted, not only on behalf of himself, but on behalf of the other members of the family. The principle applicable to the case is laid down in a number of decisions which are quoted in that case, and amongst others one of the Privy Council in the case of *Agacio v. Forbes* (2), in which it was held that one partner with whom personally a contract was made was entitled to sue upon the contract in his own name without joining his co-partners as plaintiffs. The same principle is to be found embodied in the Indian Contract Act, section 230. That section lays down that "In the absence of any contract to that effect an agent cannot personally enforce

(1) (1881) I. L. R., 7 Cal. 739. (2) (1861) 14 Moo., P. C., 160.



1904

GOPAL DAS

v.

BADDEI

NATH.

contracts entered into by him on behalf of his principal, nor is he personally bound by them." But then it is provided that such a contract shall be presumed to exist in, among other cases, a case "where the agent does not disclose the name of his principal." It has not been here expressly pleaded, and there is no evidence to show that the plaintiffs did, at the time when the goods were sold to the appellant, disclose the names of the other members of the partnership, that is, the other members of the joint family who were not parties to the transaction. This contention therefore of the learned advocate for the appellant in our opinion fails.

As regards the question of interest, the learned Subordinate Judge disbelieved two of the witnesses who gave evidence on behalf of the plaintiffs in support of an alleged contract for payment of 12 per cent. interest. But, assuming it to be the case that these are not credible witnesses, we have in addition to them the evidence of the plaintiff Nathu Mal, who distinctly says that at the time when the goods were sold, the defendant was informed that interest would be chargeable if the goods were not paid for on delivery. His evidence is sufficient to establish an agreement to pay interest. The learned Subordinate Judge has not allowed interest at the rate of 12 per cent., but thought it equitable and right to allow interest at 6 per cent. and has so directed. We think that he has acted properly in so doing, though the ground which he has given for the allowance of interest is not in our opinion satisfactory. The ground which entitles the plaintiffs to interest is the fact that there was at least an implied agreement between the parties that interest would be chargeable after the delivery of the goods.

For these reasons the appeal fails, and is dismissed with costs. The appellant must also pay the costs of this appeal of the respondent Kumar Hari Das Rai Chaudhri, as he was unnecessarily made a party, the ground alleged in the memorandum of appeal for making him a party not having been supported.

*Appeal dismissed.*

1904  
November 29.

*Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.*

JAMNA DAS (PLAINTIFF) v. RAMAUTAR PANDE AND OTHERS  
(DEFENDANTS).\*

*Hindu Law—Gift to wife—Powers of alienation of donee—Construction of document.*

Ordinarily a gift by deed or will by a Hindu to his wife does not carry the absolute interest in the absence of some indication of an intention that she should have such absolute interest in the property.

A conveyance executed by a Hindu transferring certain property to his wife, after reciting that the executant was in possession as proprietor of shares in certain villages, declared that he of his own free will transferred the share of which he was proprietor to his wife and "put her in proprietary (malikana) possession authorizing her to retain possession of the same as proprietor (malik), together with land revenue, miscellaneous items, &c." Then came this provision :—"In case of proper necessity she as my representative is at liberty in every respect to transfer the property by sale or mortgage, either in my life-time or after my death. No objection taken by any person shall be held as fit to be allowed in this respect.

*Held* that notwithstanding the use of the word "malik," the document did not confer an absolute power of alienation on the donee, but she was not empowered to transfer the property either by sale or mortgage unless a legal necessity arose for doing so. *Lalit Mohun Singh Roy v. Chukkun Lal Roy* (1) referred to.

THIS was a suit brought by one Jamna Das to recover by sale of the mortgaged property the amount due on a mortgage executed on the 22nd of June 1893, by Musammat Lakhpati Kunwar in favour of the plaintiff and his son Brahma Dat. On a partition of the family property the mortgage had fallen to the share of the father, who in consequence alone used. Part of the property mortgaged formerly belonged to one Kalka Prasad, the husband of Lakhpati Kunwar, who claimed to be entitled to it under a deed of gift from her husband executed on the 23rd of December 1881. As to the remainder, it consisted of the mortgagee rights in certain property which had been hypothecated in favour of Lakhpati Kunwar by one Bhagwati Prasad, her husband's brother. Of the various defendants, the first, Pandit Ramautar Pande, was the purchaser from the mortgagor of the equity of redemption in the mortgaged property. The second, Munni Bibi, was another

\* First Appeal No. 149 of 1902 from a decree of Rai Shankar Lal, Subordinate Judge of Mirzapur, dated the 16th of May 1902.

(1) (1897) I. L. R., 24 Cal., 834.

1904

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JAMNA DAS  
v.  
RAMAUTAR  
PANDE.

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widow of Kalka Prasad. The third, Bhagwati Prasad, was a brother of Kalka Prasad ; and the fourth defendant Badri Prasad, was a son of Bhagwati Prasad. The lastnamed died since the institution of the suit. The defendant Ramautar Pande admitted the plaintiff's claim, except in respect of interest for a certain period, for the payment of which he alleged he was not responsible. The other defendants set up the defences (1) that Kalka Prasad was not competent to execute the tamlik-namah in his wife's favour, inasmuch as he and his brother were the joint owners of the property, and therefore, he being merely a joint owner could not convey the property to his wife ; (2) that the tamlik-namah was merely a colourable transaction ; (3) that Musammat Lakhpati Kunwar, even assuming the tamlik-namah to be valid, was not competent under the powers conferred on it by her to alienate the property, and (4) that there was no consideration for the mortgage. The Court of first instance (Subordinate Judge of Mirzapur) held all these defences to be without foundation with the exception of the defence that Lakhpati was not competent to alienate the property. The Court accordingly passed a simple money decree in favour of the plaintiff. The plaintiff appealed to the High Court.

Babu *Jogindro Nath Chaudhri* and Pandit *Moti Lal Nehru*, for the appellant.

Pandit *Sundar Lal* and Babu *Parbati Charan Chatterji*, for the respondents.

STANLEY, C.J., and BANERJI, J.—The suit which has given rise to this appeal was instituted by the plaintiff Lala Jamna Das to raise the amount due to him on foot of a mortgage by sale of the mortgaged property. The property formerly belonged to one Kalka Prasad, who was the husband of the mortgagor, Musammat Lakhpati Kunwar. She mortgaged the property on the 22nd of June 1893 in favour of the plaintiff and his son Brahma Dat to secure the principal sum of 40,000. It is stated—and it is not denied—that upon a partition effected between the father and son of family property, the mortgage in question fell to the lot of the father, and therefore he alone has instituted the suit. The first defendant, Pandit Ramautar

1904

JAMNA DAS  
v.  
RAMAUTAR  
PANDE.

Pande, is a purchaser from Musammat Lakhpati of the equity of redemption of the mortgaged property, which was conveyed to him by a deed of the 24th of November 1896. The second defendant, Musammat Munni Bibi, is widow of Kalka Prasad. The third defendant, Bhagwati Prasad Dube, who has died since the institution of this suit, was a brother of Kalka Prasad, and the fourth defendant, Badri Prasad Dube, is Bhagwati Prasad's son. The mortgage was executed in favour of the plaintiff by Musammat Lakhpati, who claimed to be entitled to part of the property under a tamlik-namah executed by her husband in her favour on the 23rd of December 1881. The other portion of the mortgaged property consists of the mortgagee rights of Musammat Lakhpati in property which had been hypothecated in her favour by Bhagwati Prasad Dube.

The defences raised by the several defendants are shortly as follows :—

The defendant, Ramautar Pande, admitted the plaintiff's claim, except in respect of interest for a certain period, for the payment of which he alleged he was not responsible. The other defendants set up the defence (1) that Kalka Prasad was not competent to execute the tamlik-namah in his wife's favour, inasmuch as he and his brother were the joint owners of the property, and, therefore, he being merely a joint owner could not convey the property to his wife ; (2) that the tamlik-namah was merely a colourable transaction ; (3) that Musammat Lakhpati, even assuming the tamlik-namah to be a valid transaction in law, was not competent under the powers conferred by it on her to alienate the property ; and (4) that there was no consideration for the mortgage.

The lower Court held all these defences to be without foundation, with the exception of the defence that Musammat Lakhpati was not competent to alienate the property. Accordingly the Court below passed a simple money decree in favour of the plaintiff for the amount due to him, but in other respects dismissed the suit. Against this decree the present appeal has been preferred. Now the first question which arises for our determination is " what power of transfer, if any, had Musammat Lakhpati under the tamlik-namah ? "

1904

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JAMNA DAS  
a.  
RAMAUTAR  
PANDE.

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The document is short and simple in character. The donor, Kalka Prasad, after reciting that he was in possession as proprietor of shares in certain villages, declared that he of his own free will transferred the shares of which he was proprietor to his wife and "put her in proprietary (malikana) possession, authorising her to retain possession of the same as proprietor (malik), together with land revenue, miscellaneous items, etc." Then follows this provision:—"In case of proper necessity she, as my representative, is at liberty in every respect to transfer the property by sale or mortgage, either in my lifetime or after my death. No objection taken by any person shall be held as fit to be allowed in this respect." Now it is well established by the authorities that ordinarily a gift by deed or will by a Hindu to his wife does not carry the absolute interest in the absence of some indication of an intention that she should have such absolute interest in the property. Every case must depend necessarily upon the language used in the gift, whether it be a gift by deed or will, and it is for the Court to determine in each case whether or not an intention to give an absolute interest (*i.e.*, a heritable and alienable interest) can be inferred. It is true that a word such as "malik" may in some cases be regarded as sufficient to confer an alienable interest, and it has been so held by their Lordships of the Privy Council in the case of *Lalit Mohun Singh Roy v. Chukkun Lal Roy* (1). In the present case, however, the language of the tamlik-namah so far from leading us to suppose that Kalka Prasad intended to confer an alienable interest upon his wife, seems to us to have in express language restricted her powers of alienation. The provision that in case of proper necessity she should be at liberty to transfer the property by sale or mortgage can mean nothing else than this, that the beneficiary should not transfer the property either by sale or mortgage unless a legal necessity arose for doing so. We have listened to the argument of the learned counsel, who propounded a different view as to the construction of the document, but we are unable to follow him. We think that taking this instrument as it is, the fair and reasonable construction

1904

JAMNA DAS

v.

RAMAUTAR  
PANDE.

to put upon it is that only in case of legal necessity would the donee under it have been justified in transferring the property by mortgage as she did.

This then brings us to the second question, which has been argued at considerable length, and that is whether or not as a matter of fact there has been sufficient evidence adduced on behalf of the plaintiff appellant to justify the Court in coming to the conclusion that the mortgage the subject-matter of the suit was made to meet a valid necessity. Now it appears that Kalka Prasad lived for three years after the execution of the document, and during that period never questioned the propriety of it. This mortgage was executed partly for the purpose of raising money to satisfy an earlier bond of the 8th of June 1889, and to that earlier bond it appears that Kalka Prasad was a witness. His name appears as a witness to it. It has been suggested by the learned pleader for the respondents that there is no proof that the person who signed in his name was Kalka Prasad, the husband of Musammat Lakhpati, but it is not suggested that there was any other Kalka Prasad Dube of the same village, and we think that the reasonable inference is that the Kalka Prasad who signed that document was the husband of the mortgagor. But there is further evidence from which we may reasonably infer that the mortgage in favour of the plaintiff and his son was made for a legal necessity. At the date when this mortgage was executed the defendant Bhagwati Prasad, the father of the respondent Badri Prasad, was the nearest reversionary heir to Kalka Prasad, and we find that in a mortgage executed by him on the 8th of January 1897 he admitted that the plaintiff's mortgage was executed in order to satisfy the pressing necessities of Kalka Prasad and his wife, and further that the mortgage was executed with his full consent and approval. The language of the deed is as follows:—  
“As the said Kalka Prasad and Musammat Lakhpati Kunwar had contracted enormous debts by reason of their various necessities, Musammat Lakhpati Kunwar mortgaged the property she had acquired under the document (tamlik-namah) and her mortgagee right in my property to Lala Jamna Das, banker, resident of Mirzapur, for Rs. 40,000, by a registered document,



1904

JAMNA DAS

v.

[RAMAUTAR  
PANDE.]

dated the 2nd June 1893, and so both the properties, that is, my property and the property belonging to her, became liable to pay that lawful debt in every respect, hence Musammat Lakhpati Kunwar, in consultation with me and other relations, thought it proper to sell the property obtained by her under the tamlik-namah, and pay the lawful debt due to Lala Jamna Das together with the debts contracted for the support and necessary expenses of herself and her husband owing to their want. Accordingly she sold her property to Pandit Ramautar Pande, son of Pandit Gaya Prasad Pande, deceased, resident and zamindar of mauza Ramai Patti in the same pargana, on 24th of November 1896 for Rs. 44,000 *with my present and future consent.*" (More properly translated — "with my consent, which in future shall remain in force.") Now this appears to us to be a strong piece of evidence in support of the appellant's case, that the mortgage was executed to meet a legal necessity, and indeed it seems hard to understand how the Court below came to overlook it, for we find no mention whatsoever of it in the judgment. The learned Subordinate Judge considered that there was no evidence whatever to justify his holding that the money was borrowed to meet a legal necessity, and yet he passes by unnoticed the important admissions of the nearest reversionary heir of Kalka Prasad in the document to which we have referred. But this is not all. It appears that the defendant Bhagwati Prasad Dube instituted a suit for pre-emption of the mortgaged property, and that that suit was the subject of a compromise. We have on the record the application which was made by him for the confirmation of the compromise, and in that application he states that Musammat Lakhpati executed the sale deed, dated the 24th of November 1896, in favour of the defendant Ramautar Pande for payment of a valid debt with the consent of and in consultation with the plaintiff. Now the learned Subordinate Judge has entirely overlooked this admission on his part. It was against the interest of Bhagwati Prasad Dube to make an admission of this kind, because, if the mortgage and the sale deed were executed without any legal necessity, he as reversionary heir would have an interest in the property. So far, however, from his impeaching

1904

JAMNA DAS  
v.  
RAMAUTAR  
PANDE.

in any way the validity of these instruments, he admits that they were executed with his consent and to meet a legal necessity. This being so, we think there was abundant evidence on the record to justify the Court in coming to the conclusion that the mortgage was executed to meet a legal necessity, and therefore the Court below was wrong in the conclusion at which it arrived.

The next question which arises for our determination is in regard to the mortgagee rights of Musammat Lakhpati, which she derived under a mortgage executed by the defendant Bhagwati Prasad Dube, and which she purported to transfer under the mortgage which is the subject-matter of this suit. It is contended that the appellant is entitled to have a decree for sale of this part of the mortgaged property. It appears to us, however, whatever may be our individual views upon this question, that it is concluded by authority. This Court has in at least two cases decided that mortgagee rights cannot be sold under the provisions of the Transfer of Property Act. We must abide by those decisions unless and until they are overruled by higher authority. We therefore think that the appellant's contention in this respect cannot prevail. If the rest of the mortgaged property does not prove of sufficient value to satisfy the plaintiff's mortgage in full, it will be open to him to apply in execution for a sale of the mortgagee rights in question. This Court cannot, however, make at present any order for the sale of this portion of the mortgaged property.

The only other question is one which affects the plaintiff and the defendant Ramautar Pande only, and that is in regard to the interest which is claimed in respect of the mortgage debt for a period extending from the date of the mortgage up to the 9th of September 1899. It appears that at the date of the mortgage an agreement was come to whereby one Abdul Jabbar became lessee of the mortgaged property, and a provision was inserted in the mortgage deed to the effect that the interest on the mortgage, which was fixed at 8 annas per cent. per mensem, should be paid by the lessee, Abdul Jabbar, and that he should be responsible for the interest to the mortgagee. In the mortgage it is recited "if the said lessee fails to pay interest the

1904

JAMNA DAS

v.

RAMAUTAR  
PANDE.

abovenamed mahajans (i.e., the mortgagees) shall be at liberty to realise the amount of interest from the lessee by bringing a regular suit on the said agreement, and I, the executant, shall have nothing to do with it." It appears that by an instrument of the same date, executed by Abdul Jabbar, he agreed that during the continuance of the lease he would pay interest on the mortgage to the mortgagee, and that the mortgagee should have no concern with the mortgagor in respect of such interest. Having regard to this definite and clear agreement between the parties it is quite manifest that the interest which accrued due on the mortgage during the subsistence of the lease cannot be claimed by the mortgagee as against the mortgagor. The lease was surrendered on the 9th of September 1899. Therefore the mortgagee is not entitled in this suit to recover the interest for the period from the date of the mortgage up to the 9th of September 1899. It has been further proved that a sum of Rs. 1,200 as interest was tendered by the first defendant to the plaintiff, and that that sum was sufficient to satisfy all the interest which was at the time of tender due. This being so, plaintiff is not entitled to further interest upon the sum so tendered, and in this respect the Court below was right.

The result then is that the decree of the Court below will be varied by directing a decree to be drawn up under the provisions of section 88 of the Transfer of Property Act ordering the defendants to pay on or before the 29th of May 1905 the amount found to be due to the plaintiff, with further interest at the stipulated rate up to the date of payment, and in default of their doing so that the mortgaged property other than the mortgagee rights purported to be conveyed by the mortgage by Musammat Lakhpati be sold to satisfy the amount of the mortgage debt. The parties will pay and receive the costs both in this Court and in the Court below proportionate to failure and success.

*Decree modified.*

1904  
December 1.

*Before Mr. Justice Aikman.*

RAM LAL (DEFENDANT) v. CHUNNI LAL AND OTHERS (PLAINTIFFS.)\*  
*Act (Local) No. II of 1901 (Agra Tenancy Act), sections 79 and 81—Civil and Revenue Courts—Jurisdiction—Suit by ejected tenant for restoration of possession—Limitation.*

An occupancy tenant died leaving two daughters, who had their names recorded as occupancy tenants of their deceased father's holding, but never obtained actual possession thereof. On the contrary, the zamindar put in his own tenant. One of the daughters of the late occupancy tenant, however, gave a lease of half of the holding, and the lessees ultimately sued the zamindar's tenant in a Civil Court to recover possession. *Held* that the plaintiff's proper remedy was by suit under section 79 of Act No. II of 1901, and as he had been out of possession for something like three years, his suit was barred by limitation. *Dalip Rai v. Deoki Rai* (1) referred to.

ON the death of an occupancy tenant in 1897 his two daughters, Sundar and Mano, got their names recorded in the revenue records in place of their father as occupancy tenants. In 1898 Sundar brought a suit for partition in the Revenue Court and obtained a decree; but to this suit the zamindar, Jai Lal, was not made a party. Before her suit for partition Sundar gave a lease of half the holding to Chunni Lal and others, the plaintiffs in the present suit. The zamindar, on the other hand, put in his own tenant, Ram Lal, the present defendant. Ram Lal obtained and remained in actual possession of the holding. Sundar's lessees served a notice of ejectment on Ram Lal, but on Ram Lal's application that notice was cancelled, the Assistant Collector holding that no relation of landlord and tenant subsisted between the parties to that proceeding. On the 2nd of January 1902 Sundar's lessees instituted in the Civil Court (Munsif of Koil) a suit for possession and for damages against Ram Lal. The Munsif decreed the claim, and on appeal this decree was affirmed by the Subordinate Judge of Aligarh. The defendant thereupon appealed to the High Court.

Babu *Lakshmi Narain* for the appellants.

Mr. *Abdul Raoof* for the respondents.

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\* Second Appeal No. 15 of 1903 from a decree of Maulvi Muhammad Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 20th of November 1902, confirming a decree of Babu Khetter Mohan Ghose, Munsif of Aligarh, dated the 17th of July 1902.

AIKMAN, J.—One Kallu was the occupancy tenant of a certain holding. He died some time before September 1897, leaving two daughters, Sundar and Mano. These ladies got their names entered in the revenue records in the place of Kallu as occupancy tenants. Sundar brought a suit in the Revenue Court, and got a decree for the partition of the holding on the 18th of September 1898. To that suit the zamindar, Jai Lal, was not a party. Sundar, before the suit for partition, had given a lease of the half of the holding to the present respondents. It has been found by the lower appellate Court that, on the death of Kallu, Jai Lal, the land-holder, authorized the defendant, Ram Lal, who is the appellant, to take possession of the land in dispute. The Subordinate Judge has also found on oral and documentary evidence that Ram Lal has been in possession ever since. Sundar's lessees served a notice of ejectment on Ram Lal, but on the application of Ram Lal that notice was cancelled, the Assistant Collector holding that no relation of landlord and tenant subsisted between the plaintiffs and the defendant. Then the plaintiff's (Sundar's) lessees on the 2nd of January 1902 instituted against Ram Lal a suit for possession of the land and for damages. The plaintiffs got a decree from the Munsif, which was affirmed on appeal by the Subordinate Judge. The defendant, Ram Lal, comes here in second appeal. In my opinion the appeal must succeed. When a land-holder lets land in the occupation of a tenant to a third party, and that third party, acting under the land-holders' authority, take possession of the land, then in my opinion the tenant must be deemed to have been ousted by the land-holder, and his remedy is a suit under section 79 of Act No. II of 1901, the person claiming through the land-holder being joined as a defendant to the suit under the provisions of section 81 of the Act. Such a suit must be brought within six months of the date of dispossession. From paragraph 8 of the plaint and also from relief (b), section 14 of the plaint, it appears that the plaintiffs and their lessor Sundar have been out of possession for three years previous to the suit. In point of fact the lower appellate Court has found on the issue referred that although Sundar got her name recorded, yet neither she nor the plaintiffs

1904

RAM LAL

v.  
CHUNNI  
LAL.

1904

RAM LAL

P.  
CHUNNI  
LAL.

who claim under her ever obtained actual possession of the holding. Be this as it may, it is clear that Sundar has been out of possession for more than six months since the time she was dispossessed through the action of the land-holder. Consequently, having regard to what is said at p. 208 of the judgment in *Dalip Rai v. Deoki Rai* (1), I must hold that Sundar's right to the occupancy of the land was extinguished, and with the extinguishment of her right the rights of the plaintiffs, her lessees disappear. The result is that I allow this appeal, and, setting aside the decrees of the Courts below, dismiss the plaintiffs' suit with costs in all Courts.

*Appeal decreed.*

1904

December 3.

*Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Burdett.*

RAJHUNATH AND OTHERS (DEFENDANTS) v. GANPATJI AND  
ANOTHER (PLAINTIFFS).\*

*Civil Procedure Code, section 215A—Principal and agent—Suit for an account—Form of decree.\**

In a suit by a principal against an agent for an account, on the fact of agency being established, it is the duty of the Court to direct an account to be taken of the defendant's dealings as agent. When once the plaintiff has shown that the defendant is an accounting party, it is then for the defendant to prove the amount of his receipts and disbursements. *Hurronath Roy Bahadoor v. Krishna Coomar Bukshi* (2) and *Ram Das v. Bhagwat Das* (3) referred to.

THE suit out of which this appeal arose was brought by certain persons carrying on a *sarafi* business in the town of Karwi under the style of Sukh Ram Ram Chand to get from the defendants an account of a similar business which the plaintiffs alleged that the defendants had been carrying on in the same town as their (the plaintiffs') agents. The defendants were proprietors of a cloth shop in Karwi carrying on business under the style of Sheo Sahai Raghunath. According to the plaintiffs, the defendants were merely agents acting for them in the management of a branch firm and receiving as remuneration for their services half the profits after payment of interest

\*First Appeal No. 64 of 1902, from a decree of Maulvi Muhammad Mazhar Hasan Khan, Subordinate Judge of Banda, dated the 23rd of December 1901.

(1) (1899) I. L. R., 21 All., 204. (2) (1886) L. R., 13 I. A., 123.

(3) Weekly Notes, 1905, p. 1.



1904

RAJHUNATH  
v.  
GANPATJI.

on their advances. The defendants on the other hand alleged that they were partners with the plaintiffs. The arrangement between the parties was that the branch business should be financed by the firm of Sukh Ram Ram Chand (plaintiffs), and that interest at the rate of 9 per cent. per annum should be paid to them in respect of any advances made to the branch firm) and the balance of profits after payment of such interest was to be divided equally, that is, one-half was to go to the firm of Sukh Ram Ram Chand and the other half to the firm of Sheo Sahai Raghunath. Upon the evidence the Court of first instance (Subordinate Judge of Banda) came to the conclusion that the defendants were not partners but agents of the plaintiffs. But, instead of directing accounts to be rendered by the defendants, that Court went into the question of profit and loss and came to the conclusion that a certain sum was due to the plaintiffs in respect of which it proceeded to pass a decree. The defendants appealed to the High Court.

Pandit *Sundar Lal*, The Hon'ble Pandit *Madan Mohan Malaviya* and Babu *Damodar Das*, for the appellants.

Babu *Jogindro Nath Chaudhri* and Maulvi *Ghulam Mujtaba*, for the respondents.

STANLEY, C. J. and BURKITT, J.—The suit which has given rise to this appeal was instituted by the plaintiffs to have an account from the defendants of a *sarafi* business alleged to have been carried on by them in Karwi as agents for the plaintiffs. The plaintiffs carry on a *sarafi* business in Karwi under the style of Sukh Ram Ram Chand, and their case is that they started a branch firm in the same town, and appointed as managers of that firm the defendant Raghunath and his brother Sheo Sahai, since deceased. Sheo Sahai and Raghunath were proprietors of a cloth shop in Karwi which was carried on under the style of Sheo Sahai Raghunath. The defendants allege that Sheo Sahai and Raghunath were not agents of the plaintiffs' firm in regard to the branch business so started, but were partners with them, and the main question in the case is whether or not a partnership subsisted between these persons. The terms upon which the business was carried on are not in controversy. The arrangement was that the branch business

1904

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RAJHUNATH  
v.  
GANPATJI.

should be financed by the firm of Sukh Ram Ram Chand, and that interest at the rate of Rs. 9 per cent. per annum should be paid to them in respect of any advances made to the branch firm, and the balance of profits after payment of such interest was to be divided equally, that is, one-half to go to the firm Sukh Ram Ram Chand and the other half to Sheo Sahai Raghunath. The allegation of the defendants is that this constituted a partnership between the members of the firm of Sukh Ram Ram Chand and Sheo Sahai Raghunath in respect of this business. The plaintiffs, on the other hand, contend that Sheo Sahai and Raghunath were simply agents acting for them in the management of the branch firm and receiving as remuneration for their services half the profits after payment of interest on the advances. Now it is clear upon the evidence that the books of the branch firm were headed "Sukh Ram Ram Chand;" a memorandum book was adduced in evidence which shows this, and, indeed, this fact was admitted by the defendant Raghunath. It also appears that the book was provided by the firm of Sukh Ram Ram Chand. It also appears that all the valuable property belonging to the branch firm was deposited at night with the firm of Sukh Ram Ram Chand, and that Sheo Sahai and Raghunath accounted for the profits from day to day to this firm. Raghunath, who has been examined, although he alleges that there was a partnership between himself and Sheo Sahai and the members of the firm of Sukh Ram Ram Chand admits that in the memorandum book filed by him the name of the branch shop was described as Sukh Ram Ram Chand, but he attempts to explain this by saying that the name was so entered in the memorandum book because the book was given to him by the firm of Sukh Ram Ram Chand. He also admits that all dealings in connection with the piece-goods shop of Sheo Sahai Raghunath were carried on in the name of Sheo Sahai Raghunath, thus drawing a distinction between the two shops. The learned Subordinate Judge was satisfied upon the evidence that Sheo Sahai and Raghunath were not partners with the plaintiff's firm, but were, as the plaintiffs alleged, merely carrying on the business of the branch shop as agents and receiving the remuneration to which we have referred. In the conclusion at which he arrived

1904

RAJHUNATH  
v.  
GANPATJI.

we entirely concur. We think that all the circumstances tend to show that there was no partnership between these persons, but that the real relationship subsisting between them was that alleged by the plaintiffs. Upon this finding we agree with the Court below, and we affirm so much of the decree of the Court below as declares that no partnership subsisted between these parties, and that their relationship was that of principals and agents. But having so found the Court ought, in accordance with the express provision of section 215A of the Code of Civil Procedure, to have directed an account to be taken, such as was asked for in the plaint. Instead of doing so the Court entertained the question of the accounts and came to the conclusion that in respect of the profits of the business it was reasonable to allow a certain sum to the plaintiffs. The sum is not arrived at upon any accounts furnished by the defendants or appearing in any account books. It is mere guess work. It has been pointed out by their Lordships of the Privy Council in the case of *Hurronath Roy Bahadur v. Krishna Coomar Bukshi* (1), that in a suit for an account the Court, following the general rule, ought not to make a final decree at the hearing, but should order an account to be taken of the agent's dealings with the plaintiff's money. That is the course which the Court below ought to have followed. On finding that there was no partnership between the defendants and the plaintiffs, the Court ought to have directed the usual agency accounts to be taken. The same question came before this Court in the case of *Ram Das v. Bhagwat Das* (2). There the Court held that, the fact of agency being established, it is the duty of the Court to fix a date for the furnishing of accounts, and that, once the plaintiff has shown that the defendant is an accounting party, then it is for the defendant to prove the amount of his receipts and disbursements. This present case illustrates the propriety of having an account so taken, because if the defendant, who is an accounting party, refuses or neglects to furnish an account, then it is open to the other side to take advantage of the provisions of section 260 of the Code of Civil Procedure and enforce obedience to the order of the Court to account by

(1) (1886) L. R., 13 I. A. 123. (2) Weekly Notes, 1905, p. 1.

1904

RAJHUNATH  
v.  
GANPATJI.

imprisonment or by attachment of property or both. We therefore must, in this respect, allow this appeal and set aside the decree of the Court below. Instead of the decree which has been passed, we direct that a decree be prepared in the terms of the prayer of the plaintiffs' plaint directing that the defendants do, before the 15th of February 1905, render an account of the agency business carried on by them on behalf of the plaintiffs as their agents and with the capital supplied by the plaintiffs, and that a decree be passed for any sum which may be found to be due by the defendants to the plaintiffs on the taking of such accounts. We accordingly direct that the record be sent back to the Court below with directions that the order of this Court may be promptly carried out and a decree passed according to law. We think that the respondents are entitled to their costs, and we accordingly so order.

*Appeal decreed.*

1904  
December 5.

*Before Mr. Justice Burkitt and Mr. Justice Aikman.*

GODU RAM AND OTHERS (OBJECTORS) v. SURAJ MAL AND OTHERS  
(DECREE-HOLDERS).\*

*Execution of decree—Attachment of debts due to judgment-debtors—Improper realization of such debts by third party—Application to compel third party to disgorge—Limitation—Contempt of Court.*

Certain plaintiffs attached before judgment some debts due to the defendants. The defendants sold the right to collect those debts to third parties, who, in defiance of the attachment, proceeded to collect some of them for their own benefit. The plaintiffs having obtained a decree in their suit, applied to the Court to compel the third parties to pay into Court the money which they had improperly collected in defiance of the Court's order. *Held* that this was not an application in execution of their decree, but an application to the Court to exercise its inherent power of punishing for contempt of Court, and that the limitation rules provided for applications to execute decrees did not apply to it.

SURAJ MAL and others, in a suit against Brij Nath Das and others, members of the firm of Sundar Das, attached before judgment certain outstandings due to the firm of Sundar Das. Notwithstanding this, Godu Ram and others, who had purchased from the firm of Sundar Das the outstandings in question and

\* First Appeal No. 55 of 1903 from a decree of Rai Anant Ram, Subordinate Judge of Ghazipur, dated the 17th of February 1903.

1904

GODU RAM  
v.  
SURAJ MAL.

other debts due to the firm, proceeded to collect those debts in defiance of the order of attachment. The attaching plaintiffs, Suraj Mal and others, obtained a decree in their suit, and subsequently applied to the Court, as if in execution of their decree, asking that Godu Ram and others might be compelled by arrest and imprisonment to disgorge the money which they had improperly collected in spite of the attachment ordered by the Court. Godu Ram and others objected that execution of Suraj Mal's decree was barred by limitation, and also that the relief sought by Suraj Mal and others could not be obtained by application in execution of their decree, but could only be obtained by means of a separate suit. The Court of first instance (Subordinate Judge of Ghazipur) over-ruled these objections and made an order as prayed. The objectors thereupon appealed to the High Court.

Pandit *Sundar Lal* and Pandit *Moti Lal Nehru*, for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondents.

BURKITT and AIKMAN, J.J. — In our opinion there is nothing in this appeal. We are informed that this appeal is brought against an order passed in execution of a decree. Such, however, is not the case. The appellants improperly laid their hands on certain funds which were in the custody of the Court, viz., certain debts due to the firm of Sundar Das, debts which under an order of the Court had been attached before judgment in a suit instituted by the respondents Suraj Mal and others. The ground on which the appellants collected those debts was an assignment to them by the firm of Sundar Das in execution of their decree. Suraj Mal and others asked for sale of those debts: the appellants objected, putting forward their own purchase. That objection was overruled on 29th January 1898. Nevertheless, and in spite of the fact that those debts were in the custody of the Court, the appellants proceeded to collect some of them, and admittedly have collected a considerable amount. In so doing the appellants were undoubtedly acting in contempt of Court. When, therefore, the respondents called upon the Court to compel the appellants to disgorge the money and to pay it into Court, under the penalty, in case of refusal, of being

1904

GODU RAM  
v.  
SURAJ MAL.

arrested, the application which the respondents made in that behalf was not an application for execution of their decree, but an application to the Court to exercise its inherent powers in compelling the appellants to disgorge and pay into Court money which they had improperly collected in defiance of the Court's order. To such an application the limitation rules provided for applications to execute decrees are not applicable. The action taken by the Court was proper under the circumstances. It is further contended that the respondents' proper remedy was to bring a suit against these appellants. To that contention we cannot accede. It would have been, we think, an act of injustice and a procedure not warranted by the Code of Civil Procedure if we were to tell these decree-holders, who were kept out of their money for so many years, that their only remedy was to bring a regular suit against Godu Ram, Ram Lal and their fellow wrong-doers. We think the decision of the Court below is perfectly right. We dismiss this appeal with costs.

*Appeal dismissed.*

1904

December 5.

## REVISIONAL CIVIL.

*Before Mr. Justice Burkitt and Mr. Justice Aikman.*

GODU RAM AND OTHERS (OBJECTORS) v. SURAJ MAL AND OTHERS  
(DECREE-HOLDERS).\*

*Civil Procedure Code, sections 2, 244—"Decree"—Appeal—Contempt of Court  
—Order directing refund of moneys realized in defiance of Courts' order—  
—Revision.*

Where a Court orders the refund of moneys improperly realized in defiance of subsisting orders of attachment, it can only order the refund of moneys actually collected: it is not competent to direct a refund of moneys recovered as costs of litigation.

*Held* also that an order passed in the exercise of the inherent powers of a Court to punish for contempt is not a decree, and no appeal lies therefrom.

In this case the Court dealt with what purported to be a memorandum of appeal as an application in revision under section 622 of the Code of Civil Procedure.

THE facts of this case are the same as those out of which First Appeal No. 55 of 1893 arose, and are set forth in the

\* Civil Revision No. 60 of 1904.



1904

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GODU RAM  
v.  
SURAJ MAL.

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report of that case at page 378 *supra*. Godu Ram and others, in obedience to the order of the Court, paid into Court the amount which they had collected in contravention of the order of attachment, but raised an objection that they were entitled to set off against this sum the amount which they had expended in bringing suits to recover the outstandings of the firm of Sundar Das from the debtors of the firm. This objection was disallowed, and thereupon Godu Ram and others appealed to the High Court against the order of the Subordinate Judge disallowing their objection. On a preliminary objection taken by the respondents that no appeal lay, the High Court directed the memorandum of appeal to be entered on the file as an application in revision, and heard the case as a revision under section 622 of the Code of Civil Procedure.

Pandit *Sundar Lal*, for the applicants.

Babu *Jogindro Nath Chaudhri*, for the opposite parties.

BURKITT and AIKMAN, JJ.— This case is connected with Execution First Appeal No. 55 of 1903, in which we have just pronounced judgment. A preliminary objection is raised to the hearing of this appeal. It is contended by the learned advocate for the respondents that no appeal lies. We are constrained to say that in our opinion that contention is correct. The proceedings which formed the subject-matter of Execution First Appeal No. 55 of 1903 were not proceedings in execution of a decree. They were proceedings by the Court in the exercise of its inherent power to punish for contempt of Court. The proceedings did not come under section 244 of the Code of Civil Procedure, and no order, to which the definition of "decree" as given in section 2 of the Code applies, was passed. We must therefore uphold the objection raised by the respondents. But we think this is a case which we might take up under section 622 of the Code of Civil Procedure, and we have accordingly heard the parties as if this were an application under that section. In the present case the question before us for decision is one of costs. When the order for the arrest of one Godu Ram, as mentioned in the previous case, was passed in default of his paying in the amount he had improperly collected, [the amount he was ordered to pay included, not

1904.

GODU RAM

v.

SURAJ MAL.

merely the sums which he had so improperly collected, but also the costs which he had recovered in the execution of his decree against the debtors of the firm of Sundar Das, that is to say, he has been compelled to pay in, not only the cash he collected, but also the costs which he incurred in instituting suits against those debtors, which costs were recovered by him in execution of decrees against them. In that matter the Court below was wrong, and it acted beyond its jurisdiction. The Court below undoubtedly had no jurisdiction to order Godu Ram to pay anything beyond the actual debts he had collected from the debtors whose debts had been attached. The Court had no power to direct him to pay into Court the costs he had received to recoup his own expenses in instituting suits and executing decrees against the debtors mentioned above. We think so far the order of the Court below must be modified. We refer this issue to the Court below for finding and report, namely, what sum of money was paid into Court by the appellants on account of costs which they had realized in execution of decrees obtained by them against the debtors of the firm of Sundar Das? There is a further claim by the appellants that they should be allowed to deduct from the amount paid by them into Court the sum spent in instituting suits and executing decrees against the debtors of the firm of Sundar Das and not recovered by them in execution of decrees. In that matter we cannot help the appellants. That is matter over which the Court below had jurisdiction, and, whether it exercised its jurisdiction rightly or wrongly, we cannot interfere. The lower Court is requested to submit its finding on the above issue with as much speed as possible, allowing both the parties to adduce evidence. On receipt of the finding ten days will be allowed for objection.

## PRIVY COUNCIL.

NURJAHAN BEGAM (PLAINTIFF) v. FAGHFUR MIRZA AND OTHERS  
(DEFENDANTS).

P. C.  
1905  
March 31  
May 12.

[On appeal from the Court of the Judicial Commissioners of Oudh].

*Construction of document—Deed of trust executed by King of Oudh providing pensions to members of family and support to religious endowment out of interest on Government Loan subscription—"Heirs"—"Descendants"—Suit for pension on death of pensioner—Succession to pension.*

By a deed of trust dated 23rd November 1839, the King of Oudh appropriated the interest of a sum of 12 lakhs of rupees lent to the East India Company to the payment in perpetuity of pensions to certain persons named in the deed and to making provision for the support of a religious endowment. By Article 1 (which stated that "the interest has been bestowed as a gift on the persons named herein") trustees were named and appointed, and after them "their descendants," to manage the endowment, and a person was named, and his "descendants" after him, as the vakil of the pensioners through whom the pensions were to be paid. Article 2 commended the pensioners and their "descendants" to the kindness and support of the Government. Article 3 provided for the gift over of the pensions in the case of any of the pensioners, or after them any of their "heirs" dying without "heir." Article 4 referred to the trustees of the endowment and their "descendants" and in case no "descendant" remained, provided for the appointment of one of the pensioners "in place of the person dying without heir." Held by the Judicial Committee (reversing the decision of the Court of the Judicial Commissioners of Oudh) that on the true construction of the deed the succession to a pension on the death of one of the pensioners was not limited to an heir who was also a descendant, but the heir by Muhammadan law of the deceased pensioner (in this case the sister) was entitled to succeed.

*Nawab Sultan Mariam Begam v. Nawab Sahib Mirza* (1) distinguished.

This construction did not introduce any inconsistency between Article 2 and Articles 1 and 3 of the deed, because the class of persons mentioned in Article 2 could not be assumed to be precisely co-extensive with the class who could, under the latter articles, enjoy the pensions.

Even if the words "heir" and "descendant" were used as convertible terms in portions of the deed relating to the devolution of the rights of the managers of the endowment and of the vakil of the pensioners, that would not affect the right of succession to the pensions, the descent of the trusteeships and the descent of the beneficial interest in the pensions being distinct things, and there being nothing to show they were intended to be governed by the same rules.

*Present*:—Lord JAMES of HEREFORD, Lord ROBERTSON, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.

(1) (1889) L. R., 16 L. A., 175; I. L. R., 17 Calc., 234.

1905

NURJAHAN  
BEGAM  
v.  
FAGHUR  
MIRZA.

APPEAL from a judgment and decree (20th June 1899) of the Court of the Judicial Commissioner of Oudh, by which a decree (3rd November 1898) of the Subordinate Judge of Lucknow was reversed, and the appellant's suit dismissed with costs.

The suit raised the question of the title to a pension granted under a deed of trust dated 23rd November 1839 by Mahomed Ali Shah then King of Oudh, to one of his daughters-in-law Nawab Khakan Bahu, and the sole question on the appeal was whether on the construction of the deed the appellant was entitled to such pension.

The circumstances under which the deed was executed were as follows :—On 22nd November 1838 a treaty was made between Mahomed Ali Shah and the East India Company by which the King lent to the Company 17 lakhs of rupees and the Company agreed to pay the interest in perpetuity as pensions to certain persons named by the King, and their heirs or descendants. That treaty is printed in Aitcheson's Treaties, ed. 1863, Vol. II, page 178. Early in 1839 the King was desirous of negotiating a further treaty making a further loan to provide for the maintenance of a mosque and tomb and to provide pensions for some persons whose names he had omitted in the treaty of 22nd November 1838. With this object he communicated with the Resident at Lucknow and on 11th January 1839, there commenced a correspondence between the King through the Resident at Lucknow and the Government, the result of which was that the Government declined to negotiate any further treaty, but suggested that the King should subscribe to a Government loan then on the point of being issued, and appropriate the interest in any way he pleased. In the result the King executed the deed of trust of 23rd November 1839, and the Government issued a promissory note for 12 lakhs of rupees in the name of the King of Oudh who endorsed the note making the interest payable to the persons named in the deed. To make provision for the better administration of the trust Act XV of 1878 was passed; and at the date of the suit the respondents were the trustees under the deed.

1905

NURJAHAN  
BEGAM  
v.  
FAGHFE  
MIRZA.

Nawab Khakan Bahu died on 21st March 1889 and on 6th November 1897 the suit was brought by the appellant on the refusal of the trustees to pay her the pension, to which she claimed to be entitled as the sister and sole heir by Muhammadan law of Nawab Khakan Bahu. The relief claimed in the plaint was a declaration of the plaintiff's title and the payment to her of the arrears of the pension amounting to Rs. 10,600.

The deed is set out in their Lordships' judgment.

The defendants pleaded that on the proper construction of the deed of trust only such of the heirs of a deceased pensioner as were also his or her issue were entitled to succeed.

The only one of the issues now material was the 3rd, whether the plaintiff was entitled to the whole or part of the pension in dispute.

On the construction of the deed the Subordinate Judge was of opinion that on the death of a pensioner the pension was payable to the heir or heirs under the Muhammadan law irrespective of the fact that such heir was not the issue of the deceased. He therefore decreed the plaintiff's claim.

On appeal the case came before the 1st Additional Judicial Commissioner (Mr. G. T. SPANKIE) and the 2nd Additional Judicial Commissioner (Mr. W. BLENNERHASSETT) the material portion of whose judgment was as follows:—

"The question for decision in this appeal is whether on a proper construction of the deed of trust the pension enjoyed by Nawab Khakan Bahu is heritable by her heirs generally or only by her descendants. \* \* \* \*

"In the case of *Nawab Sultan Mariam Begum v. Nawab Saheb Mirza* (1) their Lordships of the Privy Council decided that on a proper construction of the deed of engagement (2) in that document "the words 'heirs' and 'issue' are used as convertible terms, so that in that document the word 'heirs' must mean heirs who are issue and 'issue' must mean issue who are heirs.

"The decision of the question as to whether the pension enjoyed by Nawab Khakan Bahu devolves on her descendants

(1) (1889) L. R., 16 I. A., 175; I. L. R., 17 Calc., 234.

(2) The Treaty of 22nd November 1838.

1905

NURJAHAN  
BEGAM  
v.  
FAGHFUR  
MIRZA.

only depends on what is the meaning of the words 'heirs' in articles 1 and 3 of the deed of trust. The meaning of the words is open to doubt because the word 'heirs' is used in the 4th article as meaning an heir who is a descendant.

"It was contended for the defendant that the Court could look at the deed of engagement for the purpose of ascertaining the sense in which the word 'heirs' was used in the deed of trust, and the case cited above was relied on as establishing that the word 'heirs' in the deed of engagement was used as meaning heirs who are descendants. For the plaintiff it was contended that the Court could not look at the deed of engagement, and that that case should not be regarded as an authority as to the meaning of the word 'heirs' in the deed of engagement, as their Lordships of the Privy Council had not a correct translation of that deed before them, and the question before them was not as to the right of succession of collateral heirs.

"I am of opinion that in order to interpret the meaning of the word 'heirs' as used in the deed of trust, the Court cannot look at the deed of engagement to see in what sense the word 'heirs' is used in that deed. The deeds do not relate to the same matter and do not form part of the same transaction. It is only when two or more deeds represent a single transaction that they can be treated as one deed for the purpose of interpretation. The deed of trust and the deed of engagement do not refer to each other, and in my opinion there is no evidence that they are parts of the same transaction. If we could look at the deed of engagement, I should be disposed to hold that we were bound to accept the interpretation placed on it by their Lordships of the Privy Council. \* \* \* \* \*

"The Court is not bound to construe the word 'heirs' in articles 1 and 3 of the deed of trust as meaning heirs who are descendants, merely because in the 4th clause of that deed the word 'heir' is used in the sense of an heir who is a descendant, unless there would otherwise be a manifest inconsistency or the Court would be defeating the plain intention of the King—*In re Warren's Trusts* (1). I do not think that if the



1905

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NURJAHAN  
BEGAM  
v.  
FAGHUR  
MIRZA.

word 'heirs' in articles 1 and 3 is not interpreted to mean heirs who are descendants, there would be a manifest inconsistency between those articles and article 4, arising from the fact that if the word is not so interpreted, the office of a trustee would devolve on the descendants of the trustee, but the pension payable to him might devolve on a person who was not his descendant. But to interpret the word as meaning heirs generally, seems to me to be manifestly inconsistent with the provisions of article 2. In that article the King declares that it is necessary that the Resident for the time being should treat the pensioners enumerated in the deed and 'their descendants' with kindness, and, considering them deserving of the support of the British Government, always afford them his aid and assistance. Who were the persons for whom the King invoked the kindness, aid and assistance of the Resident for the time being? Clearly, the persons to whom the pensions were payable. If so, the persons intended by the King to be the recipients of the pensions after the pensioners, were their descendants. But if the word 'heir' in articles 1 and 3 means heirs generally, then the King intended that the heirs generally of pensioners should receive the pensions. There is therefore a clear inconsistency. The only way to avoid this inconsistency is by restricting the meaning of the word 'heirs' in articles 1 and 3 to heirs who are descendants, for the word 'descendants' in article 2 cannot be construed as meaning heirs generally.

"For these reasons, I think that the word 'heirs' in articles 1 and 3 means heirs who are descendants, and that on a proper construction of the deed of trust, the pension which Nawab Khakan Bahu enjoyed does not devolve on her heirs generally, but on her heirs who are her descendants. The plaintiff is therefore not entitled to the pension enjoyed by that lady."

The suit was therefore dismissed.

Pending the hearing of the appeal to the Privy Council the appellant died and her heirs and legal representatives were substituted for her on the record.

On this appeal

*H. Cowell* for the appellant contended that the deed of trust was to be construed by itself, and not with reference to the

1905

NURJAHAN  
BEGAM  
v.  
FAGHUR  
MIRZA.

treaty of 22nd November 1838, nor to the construction put upon the latter document by the Privy Council in *Nawab Sultan Mariam Begum v. Nawab Sahib Mirza* (1). Construing the deed by itself, it appeared from the clear and unambiguous meaning of articles 1 and 3 that it was not necessary for the plaintiff to succeed that she should be a "descendant" of the deceased pensioner: it was sufficient that she was her heir. The words were not limited to heirs who were also descendants. Nor was there any inconsistency between articles 1 and 3 and article 2 in the use of the terms "heirs" and "descendants." Article 2 related to a different matter, and was not intended to limit or define the gift.

[Counsel for the appellant was stopped by the Court who called upon the respondents to support the construction put on the deed by the Judicial Commissioners.]

*De Gruyther* for the respondents contended that the deed must be construed as a whole, all the articles together, and that article 2 in treating "heirs" and "descendants" as having the same meaning was inconsistent with articles 1 and 3, on any other construction than that the persons who were entitled to interest were heirs who were also descendants. That construction would be in accordance with the interpretation put by the Privy Council on the treaty of 22nd November 1838 as to which a similar question arose in the case of *Nawab Sultan Mariam Begum v. Nawab Sahib Mirza* (1), the decision in which, it was submitted, should be taken as being a guide to the construction of the present document. The terms of article 4 of the deed of trust also showed that the words "descendant" and "heir" were intended to be used in the deed as equivalent terms. The circumstances leading up to the execution of the deed of trust were referred to as indicating the same intention. As to the construction which had been put on the word "heir," reference was made to *Hanooman Persaud Panday v. Mundraj Koonweree* (2). The deed to be construed was a deed of trust; there was no engagement on the part of the Government to pay the pensions; and they were not intended

(1) (1889) L. R., 16 I. A., 175; I. L. R.,  
17 Calc., 234.

(2) (1856) 6 Moo., I. A., 393;  
(412).

to be paid for ever. *Bishambhar Nath v. Imdad Ali Khan* (1) was referred to.

*Cowell* was not heard in reply.

1905, May 12th.—The judgment of their Lordships was delivered by SIR ARTHUR WILSON:—

This appeal relates to the construction of a deed of trust, executed on the 23rd November 1839, by Muhammad Ali Shah, then King of Oudh, by which he settled a sum of money deposited with or lent to the East India Company, as security for certain pensions for the benefit of persons connected with his family, and for other purposes. One of the original pensioners was a daughter-in-law of the King, Nawab Khakan Bahu, who died on the 21st March 1839. The original appellant, Khakan's sister and her sole heir according to Muhammadan law, claimed to be entitled to succeed to the pension, and brought the present suit against certain trustees to establish her title and to recover arrears. The only question is whether the title to the pension descended to the heirs general of the original pensioner, or whether the right to succeed was limited to heirs who are also issue.

The deed is a very short one; and according to the translation embodied in the judgment of the Subordinate Judge, which all parties have accepted as correct, it is in substance as follows:—

"Article 1st. The sum of twelve lakhs of Lucknow *Sicca* rupees . . . . . has been deposited by us in perpetuity in the Honourable Company's Treasury . . . . . and the interest . . . . . has been bestowed as a gift upon the persons herein mentioned, and for the expenses of Huseinabad Mubarak, &c. We have nominated and appointed . . . . . and after them their descendants, generation after generation, to the situation of *Daroghas* or Superintendents of Mosque, and . . . . . and his descendants after him to the duties of *vakeel* of the pensioners only . . . . .

"It is incumbent on the officers of the Honourable Company's Government to pay in perpetuity . . . . . to" (the *Daroghas* of the Mosque) "and to their descendants, generation after generation . . . . . the money for the expenses of the Huseinabad Mubarak . . . . . The stipends of the pensioners are to be paid through" (the *Vakeel*) . . . . . "and should any of the pensioners enumerated in this deed, or their heirs, go and reside within the territories of the Honourable Company, the Resident for the time being shall cause their pension to be remitted to their place of residence." (The list of pensioners follows, of whom Nawab Khakan Bahu is one.)

(1) (1890) L. R., 17 I. A., 181; I. L. R., 18 Calc., 216.

1905

NURJAHAN  
BEGAM  
v.  
FAGHFEUR  
MIRZA.



1905

NURJAHAN  
BEGAM  
v.  
FAGHFUE  
MIRZA.

"Article 2nd. As the pensioners enumerated in this deed are the objects of our peculiar consideration and favours it is necessary that the Resident for the time being owing to the union and friendship subsisting between the two Governments treat them and their descendants with kindness, and considering them deserving of the support of the British Government, always afford them his aid and assistance.

"Article 3rd. Should it happen that any of the said pensioners or after them any of their heirs die without heir, the pension of the deceased shall be paid by the Resident for the time being for the expenses of Huseinabad Mubarak, &c. to the Superintendent . . . .

"Article 4th. As the whole of the income and disbursements of Huseinabad Mubarak and . . . . have been placed entirely at the disposal of" (the *Daroghas*) " . . . . it is necessary, that they and their descendants should receive with honesty the sums set apart . . . . and should no descendants of the Mutawallis or Superintendents of the Mosque or of the Yakeel remain, let the Resident for the time being, with the concurrence of three-fourths of the pensioners, appoint in the place of the person dying without heir one of the pensioners to the situation of the person dying without heir."

The deed provides for two things, the religious endowment and the pensions, and appoints trustees to administer the one and a vakil to pay the other, with a gift over, in case of the lapse of any of the pensions, of the amount so set free to the religious endowment.

The clauses dealing directly with the beneficial enjoyment of the pensions and the succession to such enjoyment are clauses 1 and 3. These clauses are not framed as clauses of similar purport would probably have been framed by lawyers in this country. Clause 1, which embodies the gift, contains in the actual terms of gift no words of limitation. These are to be sought partly in other words in clause 1, but more clearly in clause 3, which deals with the expiration of the pensions and the gift over. And this is a method of dealing with such matters not unfamiliar in Indian documents.

If these clauses stood alone there could be no doubt, first, that the pensions were to descend by inheritance (which is not disputed), nor secondly, that the descent was to be to heirs general.

But it is said that the literal meaning of these clauses must be rejected, and that "heirs" must be understood as including only heirs who are also issue; and for this three reasons are given:—

1905

NURJAHAN

BEGAM

v.

FAGHFUR

MIRZA.

First, it is said (and this is true) that in the year 1838, a year before the execution of the present trust deed, the King executed another document of the nature of a treaty or arrangement with the East India Company, by which he settled pensions upon other members of his family; that that document was construed by this Board in the case of *Nawab Sultan Mariam Begum v. Nawab Sahib Mirza* (1) in which it was held that in the document then under consideration, in which the words "heirs" and "issue" were both used, each must be understood as meaning heirs who were also issue; and it was argued in this case that the document so construed should be used for the purpose of ascertaining the meaning of the one now before their Lordships. With respect to this contention their Lordships entirely agree with the learned Judges in the Appeal Court in India. The document now in question does not embody or refer to the earlier document; the two documents are not in any sense parts of one transaction; they are not even contemporaneous documents. Nor does the decision on the earlier document afford a precedent for the interpretation of that now in question, for the language of the two documents is entirely dissimilar.

Apart from the attempt to import the meaning of the earlier into the construction of the later document, and limiting the inquiry to the language of the latter alone, two arguments were used. One was founded upon Article 2 of the deed of trust, which commended to the kindness and support of the British Government the pensioners "and their descendants." The Appeal Court in India differing on this point from the First Court, thought that this clause introduced a manifest inconsistency with clauses 1 and 3 if construed literally. But this can only be so on the assumption that the class of persons commended to the good offices of the British Government were of necessity exactly co-extensive with the class who could enjoy the pensions. And their Lordships are not prepared to make this assumption.

The only point that remains for consideration is the argument based upon a comparison of certain words in clauses 1 and

(1) (1889) L. R., 16 I. A. 175; I. L. R., 17 Calc., 234.

1905

NURJAHAN  
BEGAM  
v.  
FAGHFUR  
MIRZA.

4 of the deed, relating to the devolution of the rights of the mutawallis of the religious endowment and of the vakeel of the pensioners, in which it is said that the terms "heirs" and "descendants" are used as convertible terms, and it was contended that for this reason the word "heirs" must, throughout the whole deed, mean heirs who are also descendants. This contention did not find favour in either of the Courts in India. And their Lordships think that those Courts were right. The descent of the trusteeship and the descent of the beneficial interest in the pensions are distinct things, and their Lordships have no right to assume that the King intended them to be governed by the same rules. The ambiguity of the language used on the one subject cannot control the clear and unambiguous words employed with regard to the other.

Their Lordships will humbly advise His Majesty that the decree of the Judicial Commissioner's Court should be set aside with costs, and that of the Subordinate Judge restored.

The respondents will pay the costs of this appeal.

*Appeal allowed.*

Solicitors for the appellants : *Barrow, Rogers and Nevill.*

Solicitors for the respondents : *T. L. Wilson & Co.*

J. V. W.

## APPELLATE CIVIL.

1904

*December 4.*

*Before Mr. Justice Sir William Burkitt and Mr. Justice Aikman.*  
PARMANAND AND ANOTHER (DECREE-HOLDERS) v. LOKMAN DAS  
AND OTHERS (JUDGMENT-DEBTORS).\*

*Mortgage—Redemption—Execution of decree—Redemption money paid into Court, but part subsequently withdrawn in execution of plaintiffs' decree for costs.*

Where the full amount fixed by the Court in a decree for redemption of a mortgage was paid into Court within the time limited by the decree, it was held that the plaintiffs mortgagors did not lose their right to possession of the mortgaged property by the fact of their having attached and withdrawn from Court a portion of the sum so paid in execution of their decree for costs of the suit.

\* First Appeal No. 36 of 1904, from a decree of Maulvi Muhammad Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 5th of February 1904.



1904

PARMANAND

v.

LOKMAN  
DAS.

IN this case Parmanand and Munna Lal held a decree, dated the 23rd of December 1899, for redemption of certain property. Within the period limited by the decree, namely, on the 20th of January 1900, the decree-holders deposited the amount of the decree, Rs. 6,000, but out of this amount they, on the 19th of February 1900, proceeded to attach Rs. 641, being the amount of costs awarded to them by the Court of first instance. On the 30th of March 1900 an appeal was instituted in the High Court by the judgment-debtors. This appeal was dismissed on the 19th of May 1902, and a further sum of Rs. 213-8-3 was decreed as costs in favour of the decree-holders. This amount also the decree-holders proceeded to attach out of the Rs. 6,000 deposited in the lower Court in pursuance of their decree for redemption. The decree-holders realized the full amount of their costs; and on the 8th of July 1902 they got possession of the mortgaged property. On the 4th of October 1902 the mortgagees applied to the lower Court asking to have the mortgaged property restored to them upon the ground that the decree-holders had not paid in the full amount of the decree. They admitted that Rs. 6,000 had been deposited, but contended that by attaching part of that sum for their costs they had reduced the amount in Court below what was necessary to entitle them to get possession of the property. The Court of first instance (Subordinate Judge of Aligarh) accepted this contention and directed the property to be restored to the mortgagees. From this order the decree-holders appealed to the High Court.

Mr. A. E. Ryves, Babu Jogindro Nath Chaudhri and Munshi Gobind Prasad for the appellants.

Pandit Sundar Lal, Pandit Moti Lal Nehru and Munshi Gulzari Lal, for the respondents.

BURKITT and AIKMAN, JJ.—In this case the appellants obtained a decree for redemption against Lokman Das and others on the 23rd of December 1899. The decree directed the appellants to pay Rs. 6,000 into Court as redemption money within six months from the date of the decree. On the 20th of January 1900 the decree-holders deposited Rs. 6,000. When the decree-holders obtained their decree for redemption, they

1904

PARMANAND

v.

LOKMAN  
DAS.

also obtained a decree for costs to the amount of Rs. 641 against the judgment-debtors. Subsequently to the deposit of Rs. 6,000 the decree-holders attached Rs. 641 out of the Rs. 6,000 they had deposited in Court, and they attached it in execution of their decree for costs. We may notice here that the Subordinate Judge has throughout his judgment made a blunder upon this matter. He has said in several places that this attachment for costs was made after an appeal to the High Court had been instituted. But we find that such is not the case. The appeal to the High Court was not instituted until the 30th of March 1900, whereas the attachment of Rs. 641 was made in the previous month. On appeal the decree of the lower Court was affirmed, and the plaintiffs decree-holders were given a further decree for costs to the amount of Rs. 213-8-3. To recover this amount in execution the decree-holders made a further attachment upon the Rs. 6,000, and in execution of their two decrees for costs recovered the amounts decreed to them, and finally in execution of their decree for redemption possession was delivered to them on the 8th of July 1902. On the 4th of October 1902 the mortgagees, respondents here, applied to the Court below to have the property restored to them which had just been handed over to the plaintiffs decree-holders on redemption. The ground of their application was that the decree-holders had not paid in the amount sufficient to redeem the mortgage. They admitted that Rs. 6,000 had been paid in, but their contention was that by attaching the Rs. 641 the appellants had reduced the sum available to pay off the decree. Strange to say the Court below has accepted this contention. We are unable to follow the Court in that. It is admitted that the judgment-debtors, respondents here, have obtained every farthing they were entitled to on redemption of their mortgage. All they were entitled to was Rs. 6,000, less the amounts of the successful decree-holders' decrees for costs, and that amount they have got. Whether the decree-holders were wise in paying in the whole of Rs. 6,000 and then attaching Rs. 641 for costs, or whether they ought to have paid Rs. 6,000 less Rs. 641, is a matter as to which we say nothing. But the fact remains clear and undisputed that the judgment-debtors have got every farthing to

which they were entitled. This being the case, why then the Subordinate Judge on such flimsy grounds has turned the decree-holders out of the property they had just redeemed, we fail to comprehend. We think the order of the Court below was wrong. We set it aside, and direct that the property in question be restored to the decree-holders, appellants here. We give the appellants their costs in this Court and in the lower Court.

*Appeal decreed.*

1904

PARMANAND  
v.  
LOKMAN  
DAS.

*Before Mr. Justice Sir William Burdett and Mr. Justice Aikman.*

MUHAMMAD HUSAIN AND OTHERS (DEFENDANTS) v. MUL CHAND

AND OTHERS (PLAINTIFFS).\*

1904  
December 6.

*Act No. XV of 1877 (Indian Limitation Act) schedule II, article 144—Limitation—Adverse possession—Mortgage—Possession adverse as against mortgagee not necessarily adverse as against mortgagor.*

Possession of mortgaged property obtained by ouster of a mortgagee in possession is not necessarily adverse to the mortgagor also, for the reason that such possession, so far as the mortgagor is concerned, cannot become adverse until the mortgagor becomes entitled to immediate possession. *Chinto v. Janki* (1), and *Bejoy Chunder Banerjee v. Kally Prosonno Mookerjee* (2), referred to.

THE facts of this case are as follows :—

One Madad Ali was originally the proprietor of the property in suit. On the 11th of April 1852 Madad Ali sold all his proprietary rights to one Husain Bakhsh, who, on the 17th of July 1853, mortgaged the same for Rs. 300 to Ali Hatim. In 1863 Gulshan Ali, son of the original proprietor, Madad Ali, took possession of the property. The heirs of Ali Hatim brought a suit to recover possession as mortgagees, and obtained a decree in that suit on the 6th of February 1863. This decree does not, however, appear to have been executed, but on the 22nd of October 1866 Gulshan Ali executed a qabuliat in favour of the representatives of the mortgagee. Subsequently, the Government revenue having fallen into arrears, the property in suit was farmed out to another co-sharer. It was released on the 1st of January 1881, and shortly after this the name of Husain Bakhsh, the mortgagor, was removed from the

\* First Appeal No. 8 of 1904, from an order of Syed Muhammad Ali, District Judge of Jaunpur, dated the 11th of December 1903.

(1) (1892) I. L. R., 18 Bom., 51. (2) (1878) I. L. R., 4 Calc., 327.

1904

MUHAMMAD  
HUSAIN  
v.  
MUL  
CHAND.

khewat and the name of Gulshan Ali recorded in its place, and after Gulshan Ali's death the names of his heirs were recorded in the village papers. Meanwhile the heirs of Husain Bakhsh, the mortgagor, sold the equity of redemption to the plaintiffs, who brought the present suit to redeem the mortgage of the 17th July 1853. The Court of first instance (Munsif of Jaunpur) found that the possession of Gulshan Ali and his heirs had been adverse for more than twelve years and accordingly dismissed the suit. The plaintiffs appealed to the District Judge, who, being of opinion that, whatever effect the possession of Gulshan Ali and his heirs might have as against the mortgagee, they had not acquired a title by adverse possession as against the mortgagor, allowed the appeal and remanded the case under section 562 of the Code of Civil Procedure for decision on the merits. Against this order of remand the defendants appealed to the High Court.

Mr. B. E. O'Connor, for the appellants.

Babu Jogindro Nath Chaudhri, for the respondents.

BURKITT and ATKMAN, JJ.—In our opinion the decision of the learned Judge is right. It is unnecessary for us to enquire whether the possession of Gulshan had or had not become adverse to the mortgagees, the representatives of Raja Ali Hatim. That is immaterial in this case. What the Court of first instance found is that the possession of Gulshan Ali was adverse to the mortgagor. The learned District Judge on appeal says he has been unable to discover anything to show that the possession of Gulshan Ali was adverse to the mortgagor, and it has been more than once laid down by the High Courts of this country that possession which may be adverse to the mortgagee is not necessarily adverse to the mortgagor, the reason being that the possession adverse to the mortgagor can only arise after the mortgagor has become entitled to immediate possession. Here the mortgagor was not entitled to such possession, nor would he be entitled to it until he redeemed the mortgage. We cannot say that any steps taken, apparently without any statutory authority, by the Assistant Collector or Tahsildar to remove the name of the original vendor from the record and substitute that of Gulshan Ali as owner could in any

way affect the title of Husain Bakhsh or constitute adverse possession against him (Husain Bakhsh) in Gulshan Ali. As authority for the proposition we have just laid down we refer to the case of *Chinto v. Janki* (1), and the observations of Mr. Justice Markby in *Bejoy Chunder Banerjee v. Kally Prosonno Mookerjee* (2). For these reasons we affirm the decree of the Court below and dismiss this appeal with costs.

*Appeal dismissed.*

1904

MUHAMMAD  
HUSAIN  
v.  
MUL  
CHAND.

## REVISIONAL CRIMINAL.

1904

December 7.

*Before Mr. Justice Sir William Burdett and Mr. Justice Aikman.*

EMPEROR v. GEORGE POWELL.\*

*Criminal Procedure Code, sections 443 et seqq.—European British subject—claim of status as a European British subject without claim to be tried by a jury—District Magistrate—Jurisdiction.*

One G. P., who was sent for trial before a District Magistrate on a charge of rioting under section 147 of the Indian Penal Code, claimed that he was a European British subject, but did not ask to be tried by a jury. The Magistrate after inquiry found that G. P. was not a European British subject, tried and convicted him under section 147, but passed upon him a sentence, which, as District Magistrate, he could legally have passed upon a European British subject. G. P. appealed to the Sessions Judge. The Sessions Judge, on the question being again raised, found that G. P. was a European British subject, and thereupon set aside his conviction and sentence and directed that he should be retried by the District Magistrate. *Held* that this procedure was erroneous. Inasmuch as the appellant had never claimed to be tried by a jury, and the Magistrate who had tried and convicted him was competent to try him as a European British subject and had passed a sentence which was not in excess of his powers as a Magistrate trying a European British subject, the Sessions Judge on finding that the appellant was a European British subject should have gone on and heard his appeal on the merits. *Empress of India v. Berrill* (3), distinguished.

ONE George Powell and his sons Arthur and Frank Powell were convicted by the Officiating District Magistrate of Saharanpur under section 147 of the Indian Penal Code and fined, the first Rs. 250, and the other two Rs. 100 each. At their trial before the District Magistrate George Powell and his sons

\*Criminal Revision No. 647 of 1904.

(1) (1892) I. L. R., 18 Bom., 51.

(2) (1878) I. L. R., 4 Cal., 327  
at p. 329.

(3) (1879) I. L. R., 4 All., 141.

1904

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EMPEROR  
v.  
GEORGE  
POWELL.

pleaded their status as European British subjects, but this plea was disallowed. They then appealed from their convictions and sentences to the Sessions Judge, and also questioned the correctness of the Magistrate's finding as to their status. On the latter point the Sessions Judge found that George Powell was a European British subject, but that his sons were not. The Sessions Judge did not, however, proceed to hear George Powell's appeal on the merits, but directed George Powell to be retried by the District Magistrate. The Sessions Judge was of opinion that the effect of the decision in the case of *Empress v. Berrill* (1), was that the District Magistrate had no jurisdiction to try George Powell, he being in fact a European British subject and having raised before the Magistrate the question of his status as such. Against the order of the Sessions Judge directing a retrial George Powell applied in revision to the High Court, his main plea in revision being that as he had never claimed to be tried by a jury, and as the sentence passed by the Magistrate was not in excess of the Magistrate's powers had he tried the applicant as a European British subject, the action taken by the Magistrate was not without jurisdiction, and there was no reason why the Sessions Judge should not hear his appeal on the merits.

Mr. C. Ross Alston, for the applicant.

The Assistant Government Advocate (Mr. W. K. Porter), for the Crown.

BURKITT and AIKMAN, JJ.—In this case one George Powell and his two sons, Frank and Arthur Powell, were convicted by the District Magistrate of Saharanpur of having committed an offence punishable under section 147 of the Indian Penal Code and were sentenced to pay a fine, and in default of payment to a term of imprisonment. At the trial before the Magistrate the accused put forward a claim to be tried as European British subjects. The Magistrate took evidence on that point and eventually rejected the claim. The trial then proceeded in the ordinary way.

On their conviction the accused appealed to the Sessions Judge. In their appeal they reasserted their right to be tried as



1904

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EMPEROR  
v.  
GEORGE  
POWELL.

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European British subjects and they also impugned the decision of the Magistrate on the merits. The Sessions Judge held that the elder appellant, George Powell, was a European British subject, but that his sons had not that privilege. He therefore held that the trial of George Powell was illegal, and setting aside the conviction in his case he directed the Magistrate to retry George Powell as a European British subject. The learned Judge rejected the appellant's petition to have the case argued against himself on the merits, as he did not claim to be tried by jury. He passed no order on George Powell's appeal on the merits.

George Powell has now applied to this Court in revision asking that the order of the Sessions Judge directing a new trial should be set aside, and that the Judge should be directed to take up and dispose of his appeal. His learned counsel contends that the object for which his client desired to be tried by the Magistrate as a European British subject was that he might have the benefit of the restricted powers of punishment which such a person enjoys when tried by a Magistrate, and points out that his client did not claim either before the Magistrate or before the Judge to be tried by a jury, and also that the sentence passed by the Magistrate was one which the Magistrate could have legally passed if he had found that George Powell was a European British subject. In this last matter this case differs essentially from the case of *Empress v. Berrill* (1), on the strength of which the Sessions Judge acted. In the latter case the Magistrate had passed a sentence of rigorous imprisonment for one year and of fine, which is a sentence he could not have passed on a European British subject. If this case be sent back for a new trial by the Magistrate, the only benefit the accused would gain would be that he might claim trial by jury. That privilege he did not claim from the Magistrate nor from the Judge, and we do not see that the law constrains us to compel him to claim it. The privileges which a European British subject as such enjoys when tried for an offence by a District Magistrate are, firstly, that the Magistrate's powers of punishment are much restricted, and, secondly, that he can claim

(1) (1879) I. L. R., 4 All., 141.

1904

EMPEROR  
v.  
GEORGE  
POWELL.

trial by jury. The latter privilege the appellant here has not claimed. His plea is that as the sentence passed by the Magistrate was such a sentence as he could legally have passed in the case of a European British subject, there is no reason why against his will the applicant should be forced to undergo a new trial. His appeal to the Sessions Judge as to his position as a European British subject was, he says, instituted with a view to establish his status as such subject, and that status being now established he desires that the appeal on the merits against his conviction should be heard and disposed of. We think this reasonable. We see no advantage in compelling the appellant to undergo a new trial, the proceedings at which (in case he should not claim to be tried by a jury) would be in every way the same as at the former trial, and the sentence passed on which new trial would be appealable to the Court of Session. In our opinion the order of the Sessions Judge directing a new trial was a wrong order. We set it aside and now direct the learned Sessions Judge to hear and dispose of the appeal instituted by the applicant against his conviction.

## APPELLATE CIVIL.

1904  
December 7.

*Before Mr. Justice Sir William Burdett and Mr. Justice Aikman.*

TUFAIL FATMA (PLAINTIFF) v. BITOLA AND OTHERS (DEFENDANTS).\*

*Mortgage—Satisfaction by mortgagor of decree for sale on a prior mortgage with money borrowed on the security of a subsequent mortgage of the same property—Rights of subsequent mortgages—Civil Procedure Code, section 244.*

A decree for sale and an order absolute for sale had been passed against a mortgagor. The mortgagor then borrowed more money on a mortgage of several villages, including those previously mortgaged, and applied a portion of such money in satisfying the previous decree for sale. The subsequent mortgagee then brought a suit upon her mortgage, in which she sought to bring to sale the villages which were the subject of the previous mortgage and decree. *Held* that she could do so. Section 244 of the Code of Civil Procedure did not apply, and there was no reason why the plaintiff should be driven to recover part of her loan by executing the previous decree and the remainder by suit on her mortgage. *Bansi Dhar v. Gaya Prasad* (1) distinguished.

\* First Appeal No. 277 of 1902 from a decree of Pandit Rajnath Sahib, Subordinate Judge of Mainpuri, dated the 6th of September 1902.

(1) (1901) I. L. R., 24 All., 179.

1904

TUFAIL  
FATMA  
vs  
BITOLA.

ONE Uman Shankar on the 15th of December 1885 mortgaged two villages—Khera Buzurg and Sarai Arjun—to Jiwan Ram. Jiwan Ram brought a suit for sale on this mortgage and obtained a decree for sale on the 2nd of August 1886. On the 4th of June 1887 Uman Shankar mortgaged eight villages, including Khera Buzurg and Sarai Arjun, to Musammatt Tufail Fatma for a sum of Rs. 14,000. Of this amount only Rs. 2,000 were paid to the mortgagor, and the remainder was kept by the mortgagee at the mortgagor's request for the purpose of paying off certain prior incumbrances on the mortgaged property. In pursuance of this agreement the mortgagee Tufail Fatma on the 13th of June 1887 paid Rs. 2,404-10-0 in satisfaction of the decree of the 2nd of August 1886 held by Jiwan Ram. On the 12th of December 1901, Tufail Fatma instituted a suit for sale on her mortgage of the 4th of June 1887, and in this suit she asked for the sale of, amongst other properties, the villages Khera Buzurg and Sarai Arjun. As to whether these two villages could be brought to sale in execution of a decree upon the plaintiff's mortgage, which is the sole question arising in this appeal, the Court of first instance (Subordinate Judge of Mainpuri) considering that it was the plaintiff, and not the mortgagor, who had paid off Jiwan Ram's decree against the two villages, held that the plaintiff was a representative of the mortgagee within the meaning of section 244 of the Code of Civil Procedure, and as such could bring these two villages to sale only by executing Jiwan Ram's decree, and not by means of a suit on her own mortgage. The Court referred to *Bansi Dhar v. Gaya Prasad* (1). This portion of the plaintiff's claim being dismissed, she accordingly appealed to the High Court.

Mr. W. K. Porter and Munshi Gobind Prasad, for the appellant.

Babu Jogindro Nath Chaudhri, Pandit Sundar Lal and Pandit Baldeo Ram Dave, for the respondents.

BURKITT and AIKMAN, JJ.—The suit in this case was brought to recover a sum of Rs. 14,000, a loan advanced by the plaintiff, Tufail Fatma, to one Uman Shankar. As security for the loan eight villages were mortgaged to the plaintiff. Of

1904

TUFAIL  
FATMAS.  
BITOLA.

these eight villages two—Sarai Arjun and Khera Buzurg—were already mortgaged to one Jiwan Ram to secure a sum of about Rs. 2,000. Jiwan Ram instituted a suit upon his mortgage and obtained a decree for sale and also an order absolute for sale. Subsequently to these proceedings the plaintiff, Musammat Tufail Fatma, advanced the sum of Rs. 14,000 to Uman Shankar on mortgage of the eight villages as mentioned above. Of this sum, Rs. 2,000 was paid in cash to the mortgagor, and the remainder of the amount was left with the plaintiff to pay off various creditors of Uman Shankar. Amongst other creditors, the plaintiff, at the request of Uman Shankar the mortgagor, paid off the amount due to Jiwan Ram upon his mortgage decree. The plaintiff has now instituted a suit to recover the sum of Rs. 14,000 lent to Uman Shankar. She has obtained a decree for most of her claim. But as regards the amount used to pay off the mortgage debt due to Jiwan Ram, the Court below has refused her a decree. That refusal is founded according to the lower Court upon the decision in the case of *Bansi Dhar v. Gaya Prasad* (1). In our opinion that case does not govern the case now before us. The facts are by no means similar. We have in the present case a prior mortgage discharged at the request of the mortgagor by the plaintiff as the mortgagor's agent. It was not in the power of the plaintiff to dictate to the mortgagor the manner in which he should apply the Rs. 14,000 which was admittedly paid to him. If the mortgagor chose to apply a part of that amount in paying off Jiwan Ram's decree and sent the amount to Jiwan Ram through the plaintiff, that did not constitute a tender by the plaintiff to Jiwan Ram of the amount of his prior incumbrance within the meaning of section 74 of Act No. IV of 1882. Such being the case, we see no reason why the plaintiff should be driven to the cumbrous procedure of partially recovering her loan by executing the discharged decree formerly held by Jiwan Ram and as to the remainder of the loan by instituting a separate suit upon her own mortgage. We think that the plaintiff can in this suit recover that portion of the loan which Uman Shankar used to discharge Jiwan Ram's decree. We allow this appeal with

costs against the answering respondents, Kalka Prasad and Ram Nivas. We discharge so much of the decree of the lower Court as dismisses the plaintiff's claim to recover Rs. 5,541-10-0 by sale of the villages, Sarai Arjun and Khera Buzurg. We find the plaintiff entitled to recover Rs. 5,541-10-0 by sale of the said two villages, and decree and order that if this amount with the costs of this appeal and proportionate costs of the suit together with future interest at 6 per cent. per annum up to the date of payment be not paid on or before the 1st of April next the said two villages, or a sufficient part thereof, be sold to recover the additional amount now decreed.]

*Appeal decreed.*

*Before Mr. Justice Sir William Burkitt and Mr. Justice Aikman.*  
 ABDUL QAYYUM (JUDGMENT-DEBTOR) v. SADR-UD-DIN AHMAD  
 KHAN (DECREE-HOLDER).\*

1904  
 December 12.

*Act No. IV of 1882 (Transfer of Property Act), section 72—Mortgage—Prior and subsequent incumbrances—Rights of usufructuary mortgages who satisfies a decree on a prior mortgage of the property mortgaged to him.*

*Held* that a usufructuary mortgagee who satisfies a decree for sale on a prior mortgage affecting the property mortgaged to him is entitled to retain possession until the amount so paid as well as the amount due in respect of his own mortgage has been realized.

THE facts of this case are as follows:—

On the 4th of August 1893 Lachmi Narayan and his wife Musammat Kailash Kunwar mortgaged mauza Muzaffarnagar to Dila Ram for Rs. 7,000. On the 11th of August 1894 they mortgaged Muzaffarnagar to Sadr-ud-din Ahmad Khan for Rs. 22,051. This second mortgage was usufructuary *quâ* the interest; and the mortgagee was put into possession. By an agreement of the 18th of August 1894 the mortgagors agreed to discharge the prior mortgage held by Dila Ram, but in the event of the puisne mortgagee being obliged to do so, they agreed that any amount which he might have to pay might be recovered from them personally and by sale of mauza Hariapur, which was mortgaged by way of additional security. The

\* First Appeal No. 101 of 1904 from a decree of Babu Prag Das, Subordinate Judge of Bareilly, dated the 30th of January 1904.

1904

ABDUL  
QAYYUM  
v.  
SADR-UD-  
DIN AHMAD  
KHAN.

mortgagors did not discharge Dila Ram's mortgage. A suit for sale was brought by the heirs of the prior mortgagee and a decree obtained on the 9th of October 1901. Sadr-ud-din Ahmad Khan, who had been made a party, as puisne mortgagee, to the suit, on the 1st of April 1902, paid up Rs. 15,087-8-0 in satisfaction of this decree. Sadr-ud-din Ahmad Khan then sued on the agreement of the 18th of August 1894 to recover the amount so paid by sale of Hariapur. He obtained a decree for sale, and himself purchased Hariapur for Rs. 6,083. Having done so he next applied for an order absolute for sale of Muzaffarnagar, or rather of the mortgagors' interest therein. This application was opposed by the purchaser of the mortgagors' interests, Abdul Qayyum. The Court of first instance (Subordinate Judge of Bareilly) allowed the application and made the order prayed for. Abdul Qayyum thereupon appealed to the High Court.

Pandit *Sundar Lal*, Pandit *Moti Lal Nehru* and Maulvi *Muhammad Zahur*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondent.

BURKITT, J.—In this case an application for an order absolute for sale of mauza Muzaffarnagar was granted by the lower Court. The propriety of that order is contested in this appeal. Two points have been principally argued: first that the applicant respondent was not entitled to an order absolute for the sale of Muzaffarnagar because his mortgagor in a subsequent mortgage had made a statement that the applicant in seeking to recover his money was to be restricted to mauza Hariapur, which in a subsequent instrument had been mortgaged to him. We can find no support for this contention in the paper on which it is based. There is not one word in the document limiting the mortgagee rights of the respondent to Hariapur only. The paper does not say that after its execution the respondent is not to take out execution of the former decree against Muzaffarnagar. We overrule this plea.

Next, it is said that the instrument by which Hariapur was mortgaged was entirely an independent transaction, and that Hariapur was not mortgaged as an additional, but an independent security. No argument is addressed to us in



support of this allegation. In our opinion there is nothing in it. The decision of the Subordinate Judge is quite right.

But though we have so far found in favour of the respondent, we nevertheless are of opinion that he is not entitled to the order absolute for sale which the Court below has given. The respondent's position in this matter is that he is in actual possession of mauza Muzaaffarnagar as a usufructuary mortgagee. If he were willing to waive his rights as such and to allow that village to be sold free of incumbrance, then probably the order of the Court below could stand. The respondent, however, will not adopt that course. He wants to sell mauza Muzaaffarnagar subject to his usufructuary mortgage, that is to say, he desires to sell merely the equity of redemption. It is now the accepted rule of this Court that such a sale cannot be permitted. That which the respondent is entitled to is to retain possession of Muzaaffarnagar as a usufructuary mortgagee until the amount due on his usufructuary mortgage and the unpaid balance due on the decree obtained by the heirs of Dila Ram shall have both been discharged. Such a right is clearly given to the respondent by section 72 of the Transfer of Property Act, he having, by paying off the decree of Dila Ram's heirs, preserved the property from sale. For the above reasons, we allow the appeal, set aside the order of the lower Court and dismiss the application for an order absolute. As to costs, modifying the order of the lower Court, we direct that both parties bear their costs in this Court and in the Court below.

AIKMAN, J.—I agree. I can find nothing in the document, dated the 18th of August 1894, which would estop the respondent from recovering the unpaid balance of the amount which he paid to discharge the decree on the prior mortgage. This is a case in which a usufructuary mortgagee in possession had paid off a prior incumbrance and seeks to bring to sale the property mortgaged to recover that amount, retaining his own lien as usufructuary mortgagee. This, it is clear, he cannot do: he might bring the property to sale to recover that amount, if he waived all rights under his usufructuary mortgage, but the learned vakil for the respondent says that his client will not

1904

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ABDUL  
QAYYUM  
v.  
SADR-UD-  
DIN AHMAD  
KHAN.

1904

ABDUL  
QAYYUM  
v.  
SADE-UD-  
DIN AHMAD  
KHAN.

1904  
December 12.

agree to this. This case is clearly distinguishable from the case of *Bansidhar v. Gaya Prasad* (1) which is relied upon by the lower Court.

*Appeal decreed.*

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*

MANMATHA NATH BISWAS (PLAINTIFF) v. ROHILLI MONI DAS  
AND OTHERS (DEFENDANTS).\*

*Act No. I of 1877 (Specific Relief Act) section 42.—Suit by heir presumptive against life tenant to restrain waste by life tenant—Injunction.*

There is nothing in law to prevent the heir presumptive, that is, the person who would be entitled to possession if the life tenant were to die at the moment of suit, from suing for a declaration that as against the life tenant he is entitled as next reversioner, and for an injunction restraining the life tenant from wasting the property in suit. *Rani Anund Koer v. The Court of Wards* (2) followed. *Gangayya v. Mahalakshmi* (3), referred to. *Greeman Singh v. Wahari Lall Singh* (4), dissented from.

THE facts of this case are as follows:—

By his will, dated the 11th of December 1896, one Atul Chandra Sur gave all his property to his mother Srimati Rohilli Moni Dasi, to be held by her during her natural life, subject to the payment of a small allowance to the wife of the testator, who appears to have been otherwise provided for, with remainder to three persons in equal shares, namely, Surendra Nath Biswas, Srimati Nalini Kumari Dasi, wife of Manmatha Nath Biswas, and the testator's sister Srimati Basanti Kumari Dasi. The will further provided that in the event of the death of any of these persons the share of deceased should devolve upon his or her heir at law. Surendra Nath Biswas died in June 1897, and Musammat Nalini Kumari Dasi died on the 27th of June 1898. Thereupon Manmatha Nath Biswas, as the husband of Nalini Kumari Dasi and father of Surendra Nath, instituted the present suit, claiming a declaration that he was entitled as next reversioner to two-thirds of the estate of the testator after the death of the life tenant, an injunction

\* First Appeal No. 256 of 1902 from a decree of J. Sanders, Esq., District Judge of Benares, dated the 13th of August 1902.

(1) (1901) I. L. R., 24 All., 179.

(3) (1886) I. L. R., 10 Mad., 90.

(2) (1880) L. J. R., 8 I. A., 14.

(4) (1881) I. L. R., 8 Calc., 12.

restraining the life-tenant from wasting the property, the appointment of a receiver and any other relief to which the Court might consider him to be entitled.

The Court of first instance (District Judge of Benares) dismissed the suit upon the ground that the plaintiff was at best merely a contingent reversioner, and as such was not, according to the authorities, entitled to bring a suit for declaration and an injunction.

The plaintiff appealed to the High Court.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Sarat Chandra Chaudhri*), for the appellant.

Dr. *Satish Chandra Banerji*, for the respondents.

STANLEY, C.J., and BANERJI, J.—The learned District Judge ought not in our opinion to have dismissed the suit, as he did, on the ground that the plaintiff was not in a position to maintain the suit. The claim which the plaintiff put forward in his plaint is as a reversioner to one Atul Chandra Sur, deceased, for a declaration that he is entitled to the property which belonged to Atul Chandra Sur, and also for an injunction to restrain the defendant from wasting the property of the deceased, and for the appointment of a receiver, and any other relief to which the Court might consider him entitled. His claim is based upon the will of Atul Chandra Sur, which is very simple in character. By his will, dated the 11th of December 1896, Atul Chandra Sur gave all his property to his mother, the defendant, Srimati Rohilli Moni Dasi, to be held by her during her natural life, subject to the payment of a small allowance to the wife of the testator, who appears to have been otherwise provided for, with remainder to three persons in equal shares. The three persons named as reversioners after the death of Srimati Rohilli Moni Dasi are (1) Surendra Nath Biswas, (2) Srimati Nalini Kumari Dasi, wife of the plaintiff, and (3) the testator's sister Srimati Basanti Kumari Dasi. Then the will contained a provision that in the event of the death of any of these parties the share of the person so dying should devolve on his or her heirs at law. Surendra Nath Biswas died in June 1897, and Musammat Nalini Kumari Dasi died on the 27th of June 1898. The plaintiff, as the husband of the last mentioned

1904

MANMATHA  
NATH  
BISWAS  
v.  
ROHILLI  
MONI  
DASI.

1904

MANMATHA  
NATH  
BISWAS  
v.  
ROHILLI  
MONI  
DASI.

lady and father of Surendra Nath Biswas, now claims to be entitled to two-thirds of the property as presumptive heir of the deceased Atul Chandra Sur.

The learned District Judge has dismissed the suit on the ground that the plaintiff is at the best merely a contingent reversioner, and as such is not, according to the authorities, entitled to bring a suit for a declaration and an injunction. In the course of his judgment he observes:—"The plaintiff undoubtedly cannot claim a vested interest in those legacies unless he pays the full court fee, and he makes a distinct statement in section 8 of his plaint of such a claim. His suit therefore on this ground cannot hold. It also fails on the ground that it lies on a contingent interest, namely, the death of Musammat Rohilli Moni Dasi. It has been clearly laid down in 8 Calcutta, page 12, that such a suit cannot lie. There the plaintiff sued for a declaration of his right as reversioner to certain property and that certain deeds of sale executed in respect to it by the widows of its owner are void as against him, he being the presumptive heir after the death of the surviving widow. It was held that a person standing in the position of a presumptive heir on the death of a widow is not entitled to maintain a suit under section 42 of the Specific Relief Act for a declaration of his so-called reversionary right. Section 42 refers only to existing and vested rights and not to contingent rights like those of a person who has only a chance of succeeding on the death of the female heir in possession of the property." The case upon which the learned District Judge relies is the case of *Greeman Singh v. Wahari Lall Singh* (1). In it the plaintiff claimed to be entitled to certain property on the death of his grandfather's widow, and he sued for a declaration that certain alienations made by the widow were void as against him. The defence was that the plaintiff was not the reversioner, and certain parties who claimed to be the real reversioners intervened, and were made defendants by order of the Court. The plaintiff in the Court below obtained a declaration of his reversionary right, and the deeds of sale were on certain conditions declared to be void as against him. Thereupon the intervenors

appealed to the High Court. On appeal it was held that, notwithstanding the provisions of section 42 of the Specific Relief Act, the plaintiff was not entitled to the relief sought, and that the defendants who claimed as reversioners should not have been made parties to the suit. This decision was dissented from by a Division Bench of the Madras High Court in the case of *Gangayya v. Mahalakshmi* (1), and we are unable to follow the reasoning of it. The rule which governs the present case is clearly laid down in the judgment of their Lordships of the Privy Council in the case of *Rani Anund Koer v. The Court of Wards* (2). In that case it was held by their Lordships that the plaintiff being a contingent remote reversionary heir who had neither alleged nor proved that there were no nearer reversionary heirs in existence, or that they had precluded themselves from suing, the suit should be dismissed. In the course of their judgment their Lordships say:—"Their Lordships are of opinion that, although a suit of this nature may be brought by a contingent reversionary heir, yet that as a general rule it must be brought by the presumptive reversionary heir, that is to say, by the person who would succeed if the widow were to die at that moment. They are also of opinion that such a suit may be brought by a more distant reversioner if those nearer in succession are in collusion with the widow or have precluded themselves from interfering." Now in the case before us, the plaintiff, according to the claim which he makes, is the person who would succeed to the property if the defendant, who is in possession, were to die at the present moment. He therefore is the presumptive heir to the property, if his case be true, and as such is entitled to maintain a suit of the character with which we are now dealing. We find illustrations of the application of the rule laid down in section 42 of the Specific Relief Act. Illustration (e) runs as follows:—"The widow of a sonless Hindu alienates part of the property of which she is in possession as such. The person presumptively entitled to possess the property if he survive her may, in a suit against the alienee, obtain a declaration that the alienation was made without legal

1904

MANMATHA  
NATH  
BISWAS  
v.  
ROHILLI  
MONI  
DASI.

(1) (1886) L. L. R., 10 Mad., 90.

(2) (1880) L. R., 8 I. A., 14.

1904

MANMATRA

NATH

BISWAS

v.

ROHILLI

MONI

DAST.

necessity, and was therefore void beyond the widow's lifetime." This illustration shows that the present case is one to which section 42 is applicable. There was therefore no justification for the dismissal by the learned District Judge of the suit on the ground on which he relied in so doing. The suit has not been tried on the merits. The only question which appears to have been discussed and determined by the Court below is the one with which we have dealt. But in the course of his judgment the learned District Judge seems to suggest that the court fee which has been paid is inadequate. He says:—"The plaintiff undoubtedly cannot claim a vested interest in those legacies unless he pays the full court fee, and he makes a distinct statement in section 8 of his plaint of such a claim." He further says that a court fee of Rs. 12-8-0 alone was paid. In this he is in error. We find that a court fee of Rs. 11 was in the first instance paid and that, that amount being inadequate, a further court fee of Rs. 10-4-0 was paid, so that in all Rs. 21-4-0 has been paid, and not, as the learned District Judge mentions, merely Rs. 12-8-0. It is argued by the learned vakil on behalf of the respondent that the court fee which has been paid is inadequate, inasmuch as the plaintiff claims, in addition to his claim for an injunction and for a declaration of title, also the appointment of a receiver. His argument is that if a plaintiff asks the Court to appoint a receiver, he must value such claim and pay a court fee accordingly. We are at a loss to see how a value could be put upon a claim for the appointment of a receiver. But, assuming that such a claim could be valued, we are not satisfied that the court fee of Rs. 21-4-0, which has been paid, is not adequate to cover the various claims which have been made in the plaint before us. If the learned District Judge had been of opinion that the court fee was inadequate, it would have been his duty to call upon the plaintiff to make good the deficiency, and certainly he would not have been justified in dismissing the suit without giving him an opportunity of making it good. The suit therefore has been properly tried, and, as the Court was in error in dismissing it on the preliminary ground to which we have referred, we must remand the case to the Court below with directions to re-admit the suit under



its original number and try it on the merits. It may be well to add that we do not decide that the plaintiff has established that he is entitled to the property as representing his wife and son. Upon this point we express no opinion. It will lie upon him to establish that he is so entitled and therefore presumptive heir to the property. The costs here and hitherto will abide the event.

*Appeal decreed and cause remanded.*

1904

MANMATHA  
NATH  
BISWAS  
v.  
ROHILLI  
MONT  
DASI.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*

CHATARPAL AND ANOTHER (PLAINTIFFS) v. JAGRAM AND OTHERS  
(DEFENDANTS).\*

1904

December 17.

*Act No. VII of 1870 (Court Fees Act) section 28—Civil Procedure Code, section 54—Valuation of suit—Limitation—Rules of Court of the 4th April 1894, Rule 12—Duties of Munsarim.*

When reporting as to the sufficiency of the stamp on a plaint it is not necessary for the Munsarim to do more than ascertain whether the plaint is sufficiently stamped according to the plaintiff's valuation of the subject-matter of the suit: his duty does not extend to an examination of the correctness of the plaintiff's valuation.

Hence where a plaint was correctly stamped according to the plaintiff's valuation, and so reported by the Munsarim, but it was afterwards discovered—when the period of limitation for the suit had expired—that the plaintiff's valuation was wrong and the plaint was in fact insufficiently stamped, it was held that the suit was barred by limitation. *Muhammad Ahmad v. Muhammad Siraj-ud-din* (1) followed.

THE plaintiffs in this case brought a suit claiming certain property, first, as owners thereof, and in the alternative in virtue of a right of pre-emption. The suit, as regards the claim based on a pre-emptive right, was filed on the last day allowed by the law of limitation. The plaint was sufficiently stamped according to the valuation attributed by the plaintiff to the property claimed, and was so reported by the Munsarim of the Court to which it was presented. But it was found that the plaintiff's calculation was slightly inaccurate, and that on a correct valuation of the suit the plaint was in fact insufficiently stamped. The amount of the deficiency was promptly paid by the plaintiff. The Court of first instance (Subordinate Judge

\* Appeal No. 41 of 1904, under section 10 of the Letters Patent.

(1) (1901) I. L. R., 23 All., 423.

1904

CHATARPAL  
v.  
JAGRAM.

of Agra), however, relying on the ruling of the High Court in *Muhammad Ahmad v. Muhammad Siraj-ud-din* (1), held that the deficiency in court fee could not, under the circumstances, be made good after limitation had expired, and dismissed the suit. On appeal the officiating District Judge reversed the decision of the Court of first instance and decreed the plaintiff's claim for pre-emption. Both Courts decided against the plaintiff's claim on title. One of the defendants, Jagram, appealed to the High Court, and his appeal coming before a single Judge of the Court was allowed, and the decree of the Court of first instance restored. The judgment of the single Judge was as follows:—

"The plaintiffs, who are respondents here, brought a suit claiming certain property, first as owners thereof and in the alternative by virtue of a right of pre-emption.

"In regard to the first relief claimed, the decision of both the Courts is adverse to the plaintiffs. The Court of first instance dismissed the claim for pre-emption. The suit was filed on the last day allowed by the law of limitation. It is admitted that the plaint was written on paper insufficiently stamped. The mistake was not discovered until long after the period of limitation for the suit had expired. The Subordinate Judge, relying upon the decision in *Muhammad Ahmad v. Muhammad Siraj-ud-din* (1) dismissed the suit. On appeal the Officiating District Judge reversed the decision of the Court of first instance and decreed the plaintiffs' claim for pre-emption. The defendant Jagram comes here in second appeal.

"In my opinion the appeal must succeed. The decision of the Subordinate Judge is supported by the ruling relied upon by him. If the office of the Subordinate Judge had checked the details of the calculation of the land revenue in the plaint the mistake might have been discovered. The lower appellate Court seems to think that it was the duty of the office to check the calculation. Such a view was dissented from in the case cited above. It has been held in the Full Bench decision in the case of *Jaini Prasad v. Bachu Singh* (2) that when a Court fixes a time under clause (a) or clause (b) of section 54 of the Code of Civil Procedure it must be a time within limitation. It has also been held in the case of *Balkaran Rai v. Gobind Nath Tiwari* (3) that the mistake or inadvertence referred to in section 28 of the Court Fees Act is a mistake or inadvertence on the part of the Court or its officers. There was no such mistake in this case. Therefore neither under section 54 of the Code of Civil Procedure nor section 28 of the Court Fees Act could the plaintiffs be allowed an extension of time for payment of the deficient court fee. When a plaintiff waits till the very last day before instituting a suit, he ought to take particularly good care to see that his suit is properly valued

(1) (1901) I. L. R., 23 All., 423. (2) (1893) I. L. R., 15 All., 65.

(3) (1890) I. L. R., 12 All., 129.

and his plaint properly stamped. I allow the appeal with costs, and, setting aside the decree of the lower appellate Court with costs, restore that of the Court of first instance."

Against this decision the plaintiffs appealed under section 10 of the Letters Patent.

The Hon'ble Pandit *Sundar Lal* and Pandit *Baldeo Ram Dave*, for the appellant.

*Babu Jogindro Nath Chaudhri* and *Dr. Satish Chandra Banerji*, for the respondents.

STANLEY, C. J., and BANERJI, J.—This is an appeal under section 10 of the Letters Patent against a decision of one of the Judges of this Court. The suit was brought for possession of certain zamindari property, and for the purposes of the suit the claim was laid at Rs. 330, namely, five times of Rs. 66, stated to be the proportionate amount of the revenue of the land. It was found that the statement so made in the plaint was slightly inaccurate, and that in consequence of the inaccuracy an additional court fee of annas 12 was payable. That amount was promptly paid, but after the time allowed by the law of limitation had expired. In consequence of this the Court of first instance dismissed the suit. On appeal the lower appellate Court came to the conclusion that the fault was as much that of the Munsarim in not detecting the error as of the plaintiff himself in supplying inaccurate facts, and, setting aside the dismissal by the lower Court, decreed the plaintiff's claim. On appeal to this High Court, the learned Judge, from whose decision the present appeal has been preferred, came to the conclusion that the Court of first instance was right.

It appears to us that the case is settled by an authority which we are bound to follow unless and until it is overruled by higher authority. That is the case of *Muhammad Ahmad v. Muhammad Siraj-ud-din* (1). That was a stronger case than the one before us, for in it materials were given whereby the Munsarim if he had exercised any supervision over the calculation of the court fee, must, having regard to the statements contained in the plaint, have discovered that the plaintiff had made a mistake in calculation. In that case the amount of the

1904

CHATARPAL

v.  
JAGRAM.

1904

CHATARPAL  
v.  
JAGRAM.

profits was entered as Rs. 8-4-0, and the plaint stated that 15 times that sum was equal to Rs. 108-12-0, whereas 15 times that amount comes to Rs. 123-12-0. The Munsarim did not detect this mistake, and reported that the plaint was properly stamped. The learned Judges held that it was the duty of the plaintiff to give correct particulars in the plaint. They stated in the course of their judgment:—"It may be that had he (the Munsarim) gone over the plaintiff's calculation he would have discovered the mistake. We are not prepared to hold, and no authority has been cited to us for holding, that it was the officer's duty to check the plaintiff's calculation." We have been referred to Rule 12 of the Rules of Court of the 4th of April 1894, which describes the duties of the Munsarim in this respect, as follows:—"A Munsarim of a Civil Court appointed to receive plaints shall examine each plaint presented to him, and shall report thereon whether the provisions of Acts Nos. VII of 1870 and XIV of 1882 have been observed," etc. Now it appears to us that the duty of the Munsarim would be fulfilled if, on an examination of the statement in the plaint as to the value, he finds the value is calculated at 5 times the revenue of the land given in the plaint, and that it is not incumbent upon him to examine and ascertain whether the revenue so stated is or is not the correct amount of revenue of the property. In the plaint in the present case there is a lengthy detail of the property given and in it is stated the jama of the various items of property, the subject-matter of the suit, and also the proportionate share of the jama which was payable in respect of the property. By a calculation of these particulars the Munsarim might have ascertained that the proportionate amount of the revenue stated in the earlier part of the plaint was inaccurate, but it seems to us that it would be laying too heavy a burden on the Munsarim to require him to make such a calculation. We think that when the plaintiff clearly stated the value of his claim and the amount of the revenue payable in respect of the subject-matter of the suit, the Munsarim was entitled to accept the accuracy of the statements so made and report upon the sufficiency of the court fee accordingly. The case is, no doubt, a hard one, because the sum involved is very small, and it was

promptly made good, but hard cases cannot be allowed to make bad law. For these reasons, and having regard to the decision to which we have referred, we cannot see our way to interfere with the ruling of the learned Judge of this Court from whose decision the appeal has been preferred. We therefore dismiss the appeal with costs.

*Appeal dismissed.*

*Before Mr. Justice Know and Mr. Justice Blair.*

MANKI (APPLICANT) v. BHAGWANTI (OPPOSITE PARTY).\*

*Criminal Procedure Code, sections 439 and 522—Revision—Powers of High Court—Reversal of order under section 522.*

*Held* that under section 439 and section 423 (1) (d), the High Court has power, as a Court of revision, to reverse an order passed by a subordinate Court under section 522 of the Code of Criminal Procedure. *Ram Chandra Mistry v. Nobin Mirdha* (1) distinguished.

IN this case Musammat Manki was convicted by an Assistant Magistrate of offences under sections 352 and 448 of the Indian Penal Code upon the complaint of Musammat Bhagwanti. Bhagwanti then applied to the Assistant Magistrate who had convicted Manki and obtained an order under section 522 of the Code of Criminal Procedure awarding to her possession of the house the subject-matter of the offence under section 448 of the Indian Penal Code of which Manki had been found guilty. Manki appealed against her conviction and sentence to the District Magistrate, by whom she was acquitted, and she thereupon applied for a reversal of the order passed against her under section 522 of the Code of Criminal Procedure. On this application the District Magistrate reported the case to the High Court with the recommendation that the order under section 522 might be set aside. On behalf of Bhagwanti a preliminary objection was raised to the effect that the High Court had no jurisdiction to interfere in revision with an order under section 522 of the Code of Criminal Procedure.

Babu *Sital Prasad Ghosh*, for the applicant.

Munshi *Kalindi Prasad*, for the opposite party.

1904

CHATAKPAL

v.  
JAGRAM.

1904  
December 21.

\* Criminal Reference No. 452 of 1904.

(1) (1898) I. L. R., 25 Calc., 630.

1904

MANKI  
v.  
BHAGWANTI.

KNOX and BLAIR, JJ.—Musammat Bhagwanti laid a complaint against Musammat Manki and another of offences under sections 352 and 448 of the Indian Penal Code. Musammats Manki and Barku were found guilty of house trespass and sentenced to imprisonment. Musammat Bhagwanti then applied to the Criminal Court which had convicted Musammat Manki and obtained an order in her favour under section 522 of the code awarding to her possession over the house the subject-matter of the offence under section 448 of the Indian Penal Code. In the meanwhile Musammat Manki had appealed from the conviction and sentence, with the result that she was acquitted, and no offence either of using force or of committing house trespass was held to have been proved against her. There remained, however, against her the order under section 522. The law gives no appeal against such an order, and the District Magistrate has asked this Court to interfere in revision. Upon the case being called on a preliminary objection was raised on behalf of Musammat Bhagwanti that this Court had no power to interfere, and reliance was placed upon the case of *Ram Chandra Mistry v. Nobin Mirdha* (1). That case was decided before Act No. V of 1898 came into force. Among the powers conferred on this Court as a Court of revision are all the powers set out in section 423 of the Code of Criminal Procedure. By Act No. V of 1898 one additional power to those which already existed was added, namely, the power of making any amendment or any consequential or incidental order that may be just or proper. These powers are very wide, and in our opinion authorize this Court to interfere in a case like the present. As regards the merits of the case, nothing has been put forward by Musammat Bhagwanti. We set aside the order passed on the 1st June 1904, and we direct that Musammat Manki be restored to the possession of the immovable property in dispute.

(1) (1898) I. L. R., 25 Cal., 630.



*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*  
 JAI SINGH PAL SINGH AND OTHERS (DEFENDANTS) v. BIJAI PAL SINGH  
 (PLAINTIFF) AND ANOTHER (DEFENDANT).\*

1904  
 December 23.

*Hindu law—Adoption—Hindu widow—Adoption by widow, under authority from her husband, of her brother's grandson.*

The rule of Hindu law that a Hindu cannot adopt a child whose mother he could not lawfully have married does not apply *e converso* to the case of an adoption made by a widow under authority from her deceased husband, such an adoption being in law an adoption made by the widow as agent on behalf of her husband. The adoption therefore by a Hindu widow, in virtue of a written authority to adopt given to her by her deceased husband, of her brother's grandson (or son) is not according to Hindu law an invalid adoption. *Musammat Battas Kuar v. Lachman Singh* (1) discussed. *Sriramulu v. Ramayya* (2), *Ragavendra Rau v. Jayaram Rau* (3) and *Bai Nani v. Chunilal* (4) followed. *Bhagwan Singh v. Bhagwan Singh* (5) and *Chowdry Pudum Singh v. Koer Oodey Singh* (6) referred to.

THIS was a suit brought by one Kunwar Bijai Pal Singh to recover property of considerable value, both movable and immovable, constituting the estate of one Thakur Sukhram Singh, deceased, formerly a *rais* of Kora Rustampur, upon the ground that the plaintiff was the adopted son of Thakur Sukhram Singh and had been dispossessed by the principal defendant Kunwar Jai Singh Pal Singh. The plaintiff alleged that Thakur Sukhram Singh, on the 30th of September 1889, executed in favour of his wife Musammat Lachhmin Kunwar an authority to adopt a son to him. Sukhram Singh died on the 2nd of October 1889, but his widow shortly after his death caused the authority to adopt to be registered, and subsequently, on the 29th of July 1895, she duly adopted the plaintiff, who was the grandson of her brother Desraj Singh. On the same date, according to the plaintiff, Musammat Lachhmin Kunwar made a will by which three persons, namely, Lekhraj Singh, Moti Ram and Tika Ram, were appointed as managers of the estate and guardians of the plaintiff until he attained majority. On the 3rd of August 1895 Lachhmin Kunwar died, and the three managers appointed by her will applied on behalf of the

\* First Appeal No. 110 of 1902 from a decree of Maulvi Muhammad Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 8th of April 1901.

(1) N.-W. P., H. C. Rep.,  
 1875, p. 117.

(2) (1881) I. L. R., 3 Mad., 15.

(3) (1897) I. L. R., 20 Mad., 283.

(4) (1897) I. L. R., 22 Bom., 973.

(5) (1895 and 1898) I. L. R., 17  
 All., 294 and 21 All., 412.

(6) (1869) 12 Moo. I. A., 350.

1904

JAI SINGH  
PAL SINGH  
v.  
BIJAI PAL  
SINGH.

plaintiff for mutation of names in his favour in respect of the estate of Sukhram Singh. Jai Singh Pal Singh, however, opposed this application and applied to have his own name entered instead. The managers, owing, as the plaintiff alleged, to pressure brought to bear on them by the Maharaja of Jaipur, neglected the plaintiff's interests, with the result that the name of Jai Singh Pal Singh was entered in the revenue records as owner of Sukhram Singh's estate..

The defendants, who, besides Jai Singh Pal Singh, were certain persons holding derivative titles to portions of the estate depending upon the validity of the title alleged by the principal defendant, set up the defence that the alleged authority to adopt and deed of adoption were forgeries and that no such documents were ever executed. It was also alleged by the defendants that at the dates of the execution of these documents respectively Thakur Sukhram Singh and Thakurani Lachhmin Kunwar were in a dying condition and unconscious, and so incapable of executing any document. It was further set up by them that the plaintiff could not have been validly adopted, inasmuch as he is a grandson of Desraj Singh, who was the brother of Lachhmin Kunwar. Their contention was that Musammatt Lachhmin Kunwar could not have contracted a legal marriage with the plaintiff's father Raghubar Dayal, and that therefore the plaintiff could not have been legally adopted by Lachhman Kunwar.

The Court of first instance (Subordinate Judge of Aligarh) found every material issue in the suit in favour of the plaintiff, and accordingly decreed the claim. The principal defendant Jai Singh Pal Singh appealed to the High Court.

With this appeal was heard a connected appeal (No. 193 of 1902) which arose out of a suit brought by Kunwar Malayam Singh and Kunwar Raghubar Pal Singh, who claimed to be co-heirs of Sukhram Singh, to recover two-thirds of his property alleging, as did the defendants in the other suit, that there had been no valid adoption of Bijai Pal Singh.

Mr. E. A. Howard, Babu Jogindro Nath Chaudhri, Babu Satya Chandra Mukerji and Munshi Nawal Kishore, for the appellant.

Sir *Walter Colvin*, *Munshi Gulzari Lal*, *Babu Sital Prasad Ghosh* and *Munshi Lakshmi Narain*, for the respondents.

THE CHIEF JUSTICE, after stating the facts of the case as above and discussing at some length the evidence bearing on those facts, came to the conclusion that the authority to adopt, the deed of adoption and the fact of adoption had been satisfactorily proved, and that there was nothing in the evidence or in the arguments adduced before the Court to throw doubt upon the propriety of the decision of the Court below in respect of the questions of fact determined by it.

His lordship's judgment then continued:—

I now come to deal with the legal question which has been raised on behalf of the defendants appellants, namely, that an adoption by a widow of her brother's grandson cannot, according to Hindu law, be supported. The argument is that, just as in the case of an adoption by a father the mother of the adopted child should be a person between whom and the adopting father there might have been a legal marriage, so also in the case of an adoption by a widow with the assent of her husband the father of the adopted child must be a person who might lawfully have been the husband of the adoptive mother. This view is supported by Sir F. McNaghten in a lengthy comment upon the case of *Dagumbaree v. Taramonee* (1), and is accepted by some other writers on Hindu law, but it does not meet with general approval. Referring to it, Mr. Mayne in his treatise on Hindu Law and Usage says (6th Edn., p. 173):—"It seems to me, however, with the greatest respect, that this is introducing into the Hindu theory of adoption a second fiction, for which there is no foundation. The real fiction is that the adopting father had begotten the child upon its natural mother; therefore it is necessary that she should be a person who might lawfully have been his wife. There is no fiction that the natural father had also begotten the child upon the adopting mother. The natural son becomes the son, not merely of the particular wife from whom he is born, but of all the wives; and the authors of the *Dattaka Mimansa* and *Dattaka Chandrika* seem to think that the same result follows in the case

1904

JAI SINGH  
PAL SINGH  
v.  
BIJAI PAL  
SINGH.

(1) F. McN. 170, App., 10.

1904

JAI SINGH  
PAL SINGHv.  
BIJAI PAL  
SINGH.*Stanley, C. J.*

of several wives from an adoption. The fiction can hardly extend to the length of his being conceived by all. In fact it would appear that the Hindu law takes no notice of the wife in reference to adoption. The relation of the adopted son to her arises upon adoption. But the balance of authority and reasoning appears to be opposed to the idea that relationship to her has any effect upon the choice of the boy to be adopted." The authority which is relied upon for the view presented to us by the learned counsel for the appellants is a comment of Nanda Pandita, contained in the Dattaka Mimansa, section 2, article 33. In article 33, referring to the declaration of Viddha Gautama, mentioned in the preceding article, namely, "in the three superior tribes, a sister's son is nowhere mentioned as a son," Nanda Pandita declares that "the expression 'sister's son' is inclusive of the son of a brother also. Hence this meaning is deduced that a brother's son must not be adopted by a sister; for brothers are only mentioned to be adoptive parents." And at the end of the succeeding article he states:—"The adoption of a brother's son by a sister's or a sister's son by a brother could not take place on account of the difference of their kind, in being male and female, respectively." In a later passage dealing with a declaration of Caunaka that the boy to be adopted should bear "the reflection of a son," Nanda Pandita makes the comment that the boy should "bear the resemblance of a son," that is, "the capability to have sprung from the adopter himself through an appointment to raise issue on another's wife, and so forth; as in the case of the son of a brother, a near or distant, kinsman, and so forth" (section 5, article 16). It is argued that these passages establish the rule that where a widow adopts with the sanction of the husband, she must not select a son to whose father she could not have been legally married. This rule we are asked to regard as a rigid maxim of law, vitiating the adoption of the plaintiff. The rule thus laid down by Nanda Pandita is an extension of the rule of Viddha Gautama and would appear to be based upon the obsolete custom of Niyoga, according to which the begetting of offspring by another on the wife of a man who was impotent or disordered in mind or incurably diseased was sanctioned; and as in the case

1904

JAI SINGH  
PAL SINGHv.  
BIJAI PAL  
SINGH.

Stanley, C. J.

of an adoption by a husband, the adoptive son must according to Caunaka bear "the reflection of a son," so by analogy the son adopted by a Hindu widow must bear the resemblance of a son to her, that is, be the child of a father who could have procreated him without committing incest. Much useful information upon the question before us is to be gleaned from the elaborate judgment of my brother Banerji, who delivered a dissenting judgment, which was afterwards upheld by the Privy Council, in the case of *Bhagwan Singh v. Bhagwan Singh* (1) and also in the forcible judgment in that case of Chief Justice Sir John Edge. The question for determination in that case was as to the validity, according to the Hindu law of the Benares School, of an adoption amongst the three regenerate classes of a sister's son, of a daughter's son, or of a son of the sister of the mother of the adopter. The result of accepting the rule laid down by Nanda Pandita that a brother's son cannot be adopted by a sister, if the rule was ever intended to apply to a widow who makes an adoption with the sanction of her husband, which appears to me to be doubtful, entails the anomaly, that if a brother's son has been adopted by a husband in his life-time, the adoption is legal and the adopted son becomes the son, not merely of his adoptive father but of the adoptive father's wife, although such wife could not have legally been married to his father; and yet the wife surviving the husband and having authority from the husband to adopt a child could not adopt the same boy. It would also follow that if the husband in his life-time gave express sanction to his wife and directed her to adopt the son of his brother, she would not be capable of carrying out the direction by reason of the rule in question. It is admitted that if Sukhram Singh had elected in his life-time to adopt a son, the plaintiff would have been eligible for adoption and that no exception could have been taken to the choice of him. There would be this further anomaly, that if a Hindu having two wives authorized the adoption of a son by one wife, such wife might lawfully adopt the son of a father whom the other wife could not have legally married and yet the son so adopted would become the son of both wives.

(1) (1895 and 1898) I. L. R., 17 All., 294 and 21 All., 412.

1904

JAI SINGH  
PAL SINGH

v.

BIJAI PAL  
SINGH

Stanley, C. J.

Now undoubtedly the Dattaka Mimansa is a work of high authority. No rule laid down in it can be lightly rejected. Their Lordships of the Privy Council in the case of *Bhagwan Singh v. Bhagwan Singh* (1), which came before them on appeal from the decision in the case to which I have already alluded, in which the validity of the adoption of a mother's sister's son by a Hindu of any of the three regenerate classes was the subject of consideration, observed in regard to the Dattaka Mimansa as follows:—"To call it infallible is too strong an expression, and the estimates of Sutherland and of West and Buhler seem nearer to the true mark; but it is clear that both works must be accepted as bearing high authority for so long a time that they have become imbedded in the general law." Then towards the end of the judgment their Lordships say:—"For 80 or 90 years there has been a steady current of authority one way in all parts of India. It has been decided that the precepts condemning adoptions, such as the one made in this case are not monitory only but are positive prohibitions, and that their effect is to make such adoptions wholly void. That has been settled in such a way and for such a length of time as to make it incompetent to a Court of Justice to treat the question now as an open one." As I understand their Lordships' judgment they do not intend to convey by it that all the rules laid down in the work of Nanda Pandita are to be taken as unerring and rigid maxims of law to be accepted in all cases without question, but rather that they are to be regarded as of the highest authority, and when supported by a steady current of authority must be accepted as binding. I may point out one rule laid down by Nanda Pandita which has not been accepted, and that is the rule that a widow cannot adopt. Referring to the language of Atri that an adoption is to be made "by a man destitute of a son only" he observes, section (1), article (15):—"From the masculine gender here being used it follows that a woman is incompetent to adopt. Accordingly Vashishtha ordains 'Let not a woman either give or receive a son in adoption, unless with the assent of her husband.'" Then comes the following passage:—"From this the incompetency of the



widow is deduced, since the assent of her husband is impossible." Later on, in section 1, article 28, he thus explains the expression 'unless with the assent of her husband':—"Besides this part of the text 'unless with the assent of her husband' is an exceptive exemption from the general prohibition contained in the part preceding 'let not a woman either give or accept a son;' and in it the assent of the husband is the cause. Therefore the widow is incompetent to adopt; for, her husband being dead, since his assent is impossible, the exemption destitute of the cause to give it effect is without validity and other means of deducing her authority are wanting." This is not consistent with the recognized rule which prevails in at least the parts of India which are governed by the law of the Benares School, that a widow may adopt, provided that she has obtained the sanction of her husband in his life-time. I am not aware that any other of the old commentators has affirmed the rule so laid down by Nanda Pandita that a widow cannot adopt her brother's son or grandson, and our attention has not been directed to any other old authority. Messrs. West and Buhler in their work on Hindu Law, 3rd Edition, Vol. 2, p. 1032, make the following comment upon this question:—"In the earlier form of the law, as the relation of the adopted son to his adoptive mother was merely incidental, the doctrine of a possibility of union between her and the real father seems not to have been developed. It grew up as natural feeling gradually gave to the adoptive mother, as compared with the adoptive father, a more and more important relation to the child whom they brought up as their own. Then, as the condition was accepted of a possible union of the real mother with the ideal father to produce the adopted son, a corresponding notion was suggested of a similar necessary relation between the ideal mother and the real father. Thus it came to be admitted, though not at all universally, that where the real father and the adoptive mother could not without incest have joined in procreating the boy, he is not a fit subject for adoption."

1904

JAI SINGH  
PAL SINGHc.  
BIJAI PAL  
SINGH.*Stanley, C. J.*

Dr. Jolly, in his Tagore Lectures on the Law of Adoption at pages 162 and 163, expresses strong dissent from the rule laid down by Nanda Pandita. Referring to the general

1904

JAI SINGH  
PAL SINGAv.  
BIJAI PAL  
SINGH.

Stanley, C. J.

prohibition to adopt certain relations laid down by Sutherland, that no one can be adopted who might not have been the legitimate son of the adopter by a legal marriage with his mother, he observes that "a close examination of the original authorities shows that there is very little, if anything, in the Sanskrit treatises to warrant the formation of such a rule as this." He further observes that the whole question turns on the real import of a somewhat obscure passage in Nanda Pandita's Dattaka Mimansa. Nanda Pandita has apparently borrowed the elements of his theory from the Dattaka Chandrika and has literally transcribed from that work (II, 8) the sentiment that those only are capable of being adopted who might have been begotten by Niyoga and the like. This is an inference drawn from the principle that adoption imitates nature and that the adopted son ought to resemble a natural son. He further observes:—"Nanda Pandita has connected this theory with the prohibition to adopt a brother's son, or a sister's son, and has developed a general theory of forbidden relationship which he compares to forbidden relationship in marriage. This, however, is nothing but an analogy. It is one thing to speak of one who is unlike a son and another thing to exclude everyone from adoption whose mother the adopter might not have legally married. He also points out (at p. 164) that the custom of Niyoga was obsolete even in the time of some of the oldest Smriti writers, and that its obsolete character was recognized to the fullest extent in the Dattaka Mimansa (II, 64—68), and writes:—"If therefore Nanda Pandita makes use of this obsolete custom in order to justify his own opinions in regard to a different practice, it is no better than if a modern European Judge would try to settle a question regarding the offspring of an illicit connection by a reference to *jus primæ noctis*." Referring to the passage in the Dattaka Mimansa that "the adopted son must be the resemblance or reflection of a son," i.e., fit to be produced by the adopter through Niyoga, and to the mistake made by Mr. Sutherland in confounding Niyoga with legal marriage, Mr. Mandlik in his Vyavahara Mayukha (at page 480) observes:—"Niyoga is not a marriage at all of any kind whatever; and further, Niyoga presupposes at the least a former

1904

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 JAI SINGH  
 PAL SINGH  
 v.  
 BIRAI PAL  
 SINGH.  


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*Stanley, C. J.*

betrothal of the woman with whom the said Niyoga is presupposed. Niyoga, strictly speaking, means the raising up of issue on the widow of a deceased by some one on appointment. As a practice it has been reprobated by Manu. At no time in India's History was Niyoga ever exalted to the rank of marriage; and it is now a mere fossilized relic of the past. Marriage is one of the principal Samakaras amongst the Hindus; whereas Niyoga is neither a Samakara nor even a mere inferior popular observance sanctioned by custom. At the best it was according to Manu a beastly practice reprobated by the learned and expressly prohibited in the Kali age." Dr. Jolly sums up the result of his review of the principal doctrines of the Indian Law of Adoption as follows:—"It is simply a misfortune that so much authority should have been attributed in the Courts all over India to such a treatise as Nanda Pandita's Mimansa, which abounds more in fanciful distinctions than perhaps any other work on adoption. It is high time that the numerous other treatises on adoption should be thoroughly examined and given their due weight. Even hitherto in spite of the pressure exercised by the authority of Nanda Pandita, the prevailing tendency of decisions has been in favour of divesting adoptions of arbitrary restrictions which have no foundation in equity and justice." Mr. Golab Chandar Sarcar in his lectures on the Hindu Law of adoption, in dealing with the restrictions based upon relationship regarding the selection of the boy to be adopted, writes, at page 313, as follows:—"These restrictions are not only not found in the most authoritative Smritis and in the commentaries anterior to the Dattaka Mimansa, but are opposed, as I shall show later on, to institutions recognised by them. The texts of the minor Smritis bearing upon this subject are for the first time noticed by Nanda Pandita, who has laid down certain restrictions. But there appears to be an insurmountable difficulty in understanding whether any general principle of exclusion from the capacity of being adopted was intended to be laid down by him, and if so, what that principle is."

Dr. Jogindro Nath Bhattacharji in his commentaries on Hindu Law, adversely criticises the conclusions arrived at by

1904

JAI SINGH  
PAL SINGH

v.

BIJAI PAL  
SINGH.

Stanley, C. J.

Mr. Mayne on this question. According to him the test in selecting a boy for adoption is the possibility of Niyoga, and not the absence of such relationship between the adoptive father and the natural mother as renders marriage impossible. He writes (at p. 167):—"If there had been any fiction in adoption based on Niyoga, the rule of selection under consideration would have been the very opposite of what is now accepted by the modern text-writers. The doctrine favoured by them is that only the relationship between the adoptive father and the natural mother has to be taken into consideration. But, according to the ancient practice of Niyoga, a son was begotten on the wife or widow of a sonless man by a *sapinda*. In making such appointment surely the relationship between the woman and the levir was taken into consideration, and not the relationship between the sonless man and the wife of the levir." Further, he adds:—"The rules as to Niyoga furnished only the test of eligibility. When a husband adopts, he is the author of the act, and the rules and restrictions ought to be considered with reference to him. When a female makes an adoption, she is the author of the act; and in making a proper selection she must consider her relationship with the natural father." The learned writer admits that the adoption of a boy selected on these principles may sometimes lead to incongruous relationship between the child adopted and the husband and wife of the person actually adopting. Commenting upon the view expressed by Mr. Mayne in the extract which I have quoted, he says:—"If the learned author knew even the elementary canons of our religious observances, he could not have made the erroneous assertions contained in the above extract." I am unable to see the force of this criticism, particularly as the canons of religious observances referred to are not specified. It seems to me, however, that the views expressed by Mr. Mayne, as also by other modern writers on Hindu Law, are reasonable. It is difficult to understand how a boy who is admittedly eligible for adoption by a husband can be regarded as ineligible if the adoption is by the widow of that husband with his sanction. The widow can only adopt with the sanction of her husband, and, as Nanda Pandita writes, commenting upon the rule

laid down by Satyashada, the filiation to the father proceeds from the sanction only of the father and not from the act of adoption, for the wife in adopting is merely an agent. The passage runs thus:—"Section I, article 19. Now the connection of lineage to the father is the filiation as his son, *and such filiation proceeds from the sanction only of the father; not from the act of adoption, for the agent of that in this instance is the wife.*" According to this rule the real adopter is not the widow, but her deceased husband through her agency. If the deceased husband be regarded as the real adopter, then it seems to follow that the adoption of the son or grandson of his brother-in-law is unobjectionable. Mr. Jogindro Chander Ghose in his recent work on the principles of the Hindu Law rejects the theory propounded by Nanda Pandita. He writes as follows, at p. 532:—"Another and a still more surprising rule was supposed by modern lawyers to regulate adoption. It was that the boy should not be so related that his natural father could not marry the adoptive mother. The rule was given effect to in some early cases, but more recent cases have established that it has no foundation in Hindu Law." It seems to me that the weight of opinion amongst modern writers on Hindu Law supports the validity of the plaintiff's adoption.

The case law on the subject is very scanty. One decision of a Bench of this High Court has been strongly relied upon on the part of the appellants as deciding that a widow cannot affiliate a brother's son. This is the case of *Musammatt Battas Kuar v. Lachman Singh* (1). In that case Pearson and Spankie, JJ., held that the adoption by a widow of her brother's son was not valid. It appears from the judgment that the sanction of the husband to the adoption had not been obtained, and therefore the adoption was clearly invalid. It was unnecessary therefore for the learned Judges to consider the question of the eligibility of the boy who was adopted, and the view expressed by them on this point, however worthy of respect, may be treated as *obiter dictum*. Once the Court found that no authority was given for the adoption, it was bound to hold the adoption invalid. Dr. Bhattacharji in his

1904

JAI SINGH  
PAL SINGH  
v.  
BIJAI PAL  
SINGH.

Stanley, C. J.

1904

JAI SINGH  
PAL SINGHv.  
BIJAI PAL  
SINGH

Stanley, C. J.

work to which I have referred relies upon the ruling in this case. But he has inaccurately stated that in that case the adopting widow was acting under her husband's authority. He writes:—"Following the authority of the Dattaka Mimansa, the Court in that case set aside an adoption by a widow acting under her husband's authority where she had selected the son of her brother." The same question came before a Bench of the Madras High Court in the case of *Sriramulu v. Ramayya* (1). In that case it was held by Kindersley and Muttusami Ayyar, J.J., that the adoption of a wife's brother was valid. In the course of his judgment Muttusami Ayyar, J., observes:—"The Subordinate Judge is therefore in error in supposing that because the adoption of a step-brother is forbidden, the rule that legal marriage must have been possible between the adopter and the mother of the adopted boy, does not refer to their original relationship. It is true that in Dattaka Mimansa, section II, 33-34, a sister is said not to be competent to adopt her brother's son, in the same way in which a brother is incompetent to adopt his sister's son. But this restriction is not to be found in Dattaka Chandrika, and, as observed by Mr. Mayne in his work on Hindu Law, and, as repeatedly ruled by this Court, an adoption made by a woman is made for her husband. There is, moreover, no foundation in the text for the rule that the *adoptive mother* must be a person who might have legally married the natural father of the adopted boy."

In the case of *Ragavendra Rau v. Jayaram Rau* (2) in which the validity of the adoption by a Hindu widow of the son of her sister's daughter was in question, the Court, consisting of Subramania Ayyar and Benson, J.J., held that such an adoption was valid. In the course of their judgment they observed:—"The only other objection taken to the legality of the adoption rested on the fact that the adoptive mother Seshammal is the cousin of the natural father of the respondent. But this contention is also untenable, since it has been ruled in this Court that the adoption of a son of even a wife's brother is good—*Sriramulu v. Ramayya* (1). It is scarcely necessary to say that it is immaterial in such a case whether the adoption is

(1) (1881) I. L. R., 3 Mad., 15.

(2) (1897) I. L. R., 20 Mad., 233.



made by a man himself or by his wife after his death, for the adoption is for him."

The same question came before a Bench of the Bombay High Court in the case of *Bai Nani v. Chunilal* (1). In that case it was held that the adoption by a Hindu widow of her brother's son was valid. Ranade, J., in the course of his judgment, in dealing with the restriction sought to be imposed upon the right of adoption, observes:—"There is a general unanimity among the authorities that there is nothing in the Smruti texts, or in the commentaries of Mitakshara and Mayukha chiefly in force in Guzerat, which suggests any such particular limitation in the matter of adoption. The prohibitions based on near relationship had their origin chiefly in the Dattaka Mimansa, a work of Nanda Pandita, who relied solely upon the texts of Shaunaka and Sakala." Referring to these texts he says:—"These original texts expressly lay down among negative prohibitions the cases of the daughter's son, the sister's son, and the son of the mother's sister as ineligible for adoption in the case of the three higher castes of Hindu society. Nanda Pandita further enlarged their scope by analogical reasoning, and expressed an opinion that for the same reason that a brother could not adopt his sister's son, a sister could not adopt a brother's son." Later on the learned Judge observes as follows:—"As far as sister's son and daughter's son and mother's sister's son are concerned, Nanda Pandita had the authority of express texts to support him, and his remarks in respect of them furnished only the reason of the rule. In respect of the further extension of the prohibition to near relations of the adopting widow, there is no such textual authority and the commentator cannot legitimately claim the functions of the Smruti writer. \* \* \*

\* \* \* The extension sought to be given by Nanda Pandita in the Dattaka Mimansa, and after him by the author of the Dattaka Chandrika, is clearly far beyond the scope of a commentator's functions; and unless such an extension has secured general adherence in the general consciousness, or the habits and practices of the people, British Courts of Justice administering Hindu Law are not bound to give effect to it as

1904

JAI SINGH  
PAL SINGH  
v.  
BIJAI PAL  
SINGH.

Stanley, C. J.

1904

JAI SINGH  
PAL SINGHv.  
BIJAI PAL  
SINGH.

part of the general law [*Collector of Madura v. Mootoo Ramalinga* (1)].” The learned Judge further observes that:—“It deserves notice that for the reasons which led their Lordships of the Privy Council to rule in *Srimati Uma Deyi v. Gokoolanund Das Mahapatra* (2) that the positive restrictions laid down by Nanda Pandita were only directory and not prohibitive, even if this extension to the widow’s near relations were permissible, the restrictions would be at best directory only, and not mandatory; proper to be observed, but not obligatory and enforceable as positive law.”

With the exception then of the dictum in the case of *Battas Kuar v. Lachman Singh*, no authority has been laid before us in which the validity of an adoption by a Hindu widow of her brother’s son or grandson has been called in question. In the case of *Battas Kuar v. Lachman Singh*, as I have pointed out, it was unnecessary to determine the question, inasmuch as the adoption was clearly illegal, the widow not having obtained the sanction of her husband to make an adoption. I can find no sufficient grounds in the authorities for limiting the field of choice in the matter of adoption as we are asked to do by the appellants. So far as I can discover, the weight of reason and authority supports the validity of an adoption by a widow to her husband or her brother’s son or grandson. I would therefore dismiss the appeal with costs.

BANERJI, J.—The questions to be determined in this appeal are three in number; (1) whether Sukhram Singh granted permission to his wife, Musammat Lachhmin Kunwar, to adopt; (2) whether Musammat Lachhmin Kunwar did in fact adopt the plaintiff, and (3) whether such adoption, if made, is valid under the Hindu law.

Upon the first two questions I have little to add to what has been said by the learned Chief Justice. The plaintiff has produced copies, obtained from the Registration office, of (1) a document purporting to have been executed by Sukhram Singh on the 30th of September 1889, granting authority to his wife to adopt a son; (2) a deed of adoption executed by Lachhmin Kunwar on the 29th of July 1895, and (3) a will made by her

(1) (1869) 12 Moo., I. A., 436.

(2) (1878) L. R., 5 I. A., 40.

on the same date. The non-production of the original documents has been fully and satisfactorily accounted for. All the persons in whose possession the document could possibly be were summoned, and, as none of them produced the originals, the plaintiff was entitled to adduce secondary evidence of their contents. The authority to adopt was registered on the 30th of October 1889, that is, twenty-eight days after the death of Sukhram Singh. It was mentioned in a sale-deed, executed by Lachhmin Kunwar on the 6th of November 1890, nearly five years before the adoption of the plaintiff and long before his birth. There was apparently no object in fabricating the document so far back as 1889, and no satisfactory reason has been suggested for its fabrication. It is in the highest degree improbable that Desraj, the father of the plaintiff's natural father, fabricated the document in the hope that a son would be born in the future to his own son whom Lachhmin Kunwar might adopt. It has not been shown that Desraj himself had a son of tender years who might possibly be adopted. We have further the sworn testimony of Moti Ram and Rup Kishore, two of the witnesses to the document, to the effect that Sukhram Singh executed it. There is also the evidence of the pleader, Ram Prasad, a distant relation of Sukhram Singh, who has stated that having heard that Sukhram Singh was seriously ill, the witness went to see him; that Sukhram Singh showed him the authority to adopt and asked him whether the document had been correctly drawn up; that the document bore Sukhram Singh's signature at the time, and that the witness advised him to get the document registered. He further states that he was consulted because he was a legal practitioner. There is no reason to disbelieve this witness, who is evidently unconnected with either of the parties. His evidence, coupled with the other evidence in the case, fully establishes the genuineness of the authority to adopt. The objections taken to that document by the learned counsel for the appellants have been fully disposed of by the learned Chief Justice, and I entirely agree with him. The execution of the deed of adoption and the will, dated the 29th of July 1895, by Lachhmin Kunwar has been amply proved, and it has also been established beyond doubt that the usual

1904

JAI SINGH  
PAL SINGHv.  
BIRAI PAL  
SINGH.

---

Banerji, J.

1904

JAI SINGH  
PAL SINGHv.  
BIJAI PAL  
SINGH.

Banerji, J.

ceremonies of adoption were gone through. On the 1st of August 1895, that is, three days after the adoption, the fact that it had taken place was reported to the Collector by Kunwar Lekhraj Singh, and a few days afterwards, that is, on the 10th, an application was made on behalf of the plaintiff for mutation of names. These facts leave no room for doubt as to the actual adoption of the plaintiff by Lachhmin Kunwar and, indeed, this part of the case was not seriously pressed by the learned counsel for the appellants.

The third question, namely, that of the validity of the adoption is, however, not free from doubt. It is urged that as the plaintiff Bijai Pal Singh is the grandson of Desraj, the brother of Lachhmin Kunwar, he could not under the Hindu law be adopted by her. The question has not yet been authoritatively decided in these Provinces or in the sister province of Bengal. In *Musammatt Battas Kunwar v. Lachman Singh* (1) the learned Judges expressed the opinion that a woman may not adopt her brother's son. As, however, they held that the widow who made the adoption in that case had not been authorized by her husband to adopt a son, the opinion they expressed on the point now in question was only *obiter dictum*. The question was not discussed. All that the learned Judges say is that "no sufficient reason is shown why the doctrine of Nanda Pandita that a woman may not affiliate a brother's son should not be accepted as correct." The only other case in Upper India in which the point was raised was, as far as I have been able to find out, the case referred to in Sir Francis Macnaghten's *Considerations* on Hindu law, but in that case the point was not actually decided. Against the opinion of the learned Judges of this Court referred to above are the dicta of the Madras High Court in *Sriramulu v. Ramayya* (2) and *Ragavendra Rau v. Jayaram Rau* (3) to the effect that an adoption made by a woman is made for her husband, and that there is no foundation "for the rule that the adopting mother must be a person who might have legally married the natural father of the adopted boy." In the Bombay Presidency the Sastri did, in some cases referred

(1) N.-W. P. H. C. Rep., 1875, p. 117. (2) (1881) I. L. R., 3 Mad., 15.  
(1897) I. L. R., 20 Mad., 283 at p. 289.

1904

JAI SINGH  
PAL SINGH  
v.  
BIJAI PAL  
SINGH.

*Banerji, J.*

to in West and Buhler's Hindu Law, p. 1033, declare such an adoption to be illegal, but in the recent case of *Bai Nani v. Chunilal* (1) the Bombay High Court has ruled the contrary, and held that under the Hindu law a widow may adopt her brother's son.

Such being the state of the case law on the subject, we have to determine whether according to the authorities on Hindu law an adoption by a widow of her brother's son, and necessarily of her brother's grandson, is valid or not. The works of high authority on questions relating to adoption in the Benares School are the Dattaka Chandrika and the Dattaka Mimansa. According to those treatises the test of eligibility for adoption is "the capability to have been begotten by the adopter through appointment and so forth" (Dattaka Chandrika, s. V, § 8, and Dattaka Mimansa, s. V, § 16). Hence the rule stated by Mr. Mayne in his celebrated work on Hindu Law and Usage that "no one can be adopted whose mother the adopter could not have legally married" (6th Edn., p. 169). This rule manifestly applies to the case of a male person adopting a boy to himself. Nanda Pandita, the author of the Dattaka Mimansa, has, however, extended it to the case of a female. In s. II, § 32, he says:—"Brothers and sisters also of the whole blood are not reciprocally the adoptive parents of the son (of any of them.)" Again in § 33 he observes:—"The expression 'sister's son' is inclusive of the son of a brother also. Hence this meaning deduced that a brother's son must not be adopted by a sister." Similarly in § 34 he says:—"The adoption of a brother's son by a sister, or a sister's son by a brother, could not take place." The learned author does not base his conclusion upon the authority of any of the *Smritis* or institutes of sages. The Dattaka Chandrika, which is of an earlier date than the Dattaka Mimansa, does not lay down any such prohibition in the case of adoption by a female. Nor is it found in any of the texts of the sages Saunaka and Sakala from which most of the rules contained in the Dattaka Mimansa are deduced. It is not easy to follow the reasoning upon which the rule propounded by

(1) (1897) I. L. R., 22 Bom., 973.

1904

JAI SINGH  
PAL SINGHv.  
BIJAI PAL  
SINGH.

Banerji, J.

Nanda Pandita is founded. After quoting the text of Manu :—  
 “If one among brothers of the whole blood (ekjata) be possessed of male issue (putraban) Manu pronounces that they all are fathers of the same, by means of that son”—he observes :—  
 “In this text the state of brothers as adoptive fathers being propounded, their incapacity to be the objects of adoption follows.” Referring to the use of the word “brothers” he states :—“From the masculine gender being used, it results that brothers and sisters also of the whole blood are not reciprocally the adoptive parents of the son (of any of them),” and then he deduces the rule in § 33 which I have quoted above. It may be observed that according to the authorities of the Benares School a woman cannot adopt a son unless authorized by her husband to do so. Vashishta and Bandhayana ordain that “a woman shall neither give nor accept a son except with the husband’s assent.” (Bhattacharji’s Hindu Law, 2nd Edn., p. 152, and Dattaka Mimansa, s. I, section 15). An adoption made to herself is therefore not valid (Mayne, p. 140). It has also been held that an adoption is made to the husband only, and that he may make an adoption “without his wife’s assent and notwithstanding her dissent, although the act of adoption affiliates the son both to the husband and the wife (Mayne, p. 139). A Hindu ~~widow~~ governed by the Mitakshara law of the Benares School may, with the express permission of her husband given in his life-time, adopt a son, but such adoption is to the husband. In making it the widow, according to the authorities, acts only as the agent of the husband. This appears not only from the texts of Vashishta and Bandhayana cited above, but also from the Dattaka Mimansa itself. In s. I, § 19, the author says :—  
 “The connection of lineage to the father is the affiliation as his son; and such filiation proceeds from the sanction only of the father; not from the act of adoption, *for the agent of that in this instance is the wife.*”

Their Lordships of the Privy Council also appear to have been of the same opinion in the case of *Chowdry Pudum Singh v. Koer Oodey Singh* (1). It was held in that case that an adoption may be made by a widow under an authority



conferred upon her for that purpose by her husband, but such authority must be strictly carried out, as the adoption is for the benefit of the deceased husband and not the widow alone. See also the note appended to Vyava-tha No. 503 in the Vyavastha Darpan by Shama Charan Sircar. As it must now be taken to be well established that a widow making an adoption acts as the agent of the husband, and as the adoption is to the husband, the test of eligibility must be the test which would have applied had the adoption been made by the husband himself in his life-time. It has been ruled, and is indeed conceded, that a man may validly adopt the son of his wife's brother. Such an adoption would not offend against the rule that no boy should be adopted whose mother in her maiden state could not have been married to the adopter, or with whom the adopter could not have "carnal knowledge" according to the obsolete practice of *niyoga*. If, therefore, the husband could himself have adopted the boy, there appears to be no reason why his widow, who is merely his agent in this respect, should not be competent to do so, and there appears to be no valid reason for extending the rule to the widow. It seems that when Nanda Pandita declared that a brother's son must not be adopted by a sister he had in view an adoption by a woman to herself, which in his opinion would not be an adoption to her husband. He could not possibly have contemplated the case of a widow, for, according to him, a widow is incompetent to adopt (§ 16, s. I). The rule propounded by him can only be justified on the principle of incongruous relationship (*virudha sambandha*). No doubt it would offend Hindu ideas if a woman were to become, as she must become by adoption, the mother of her brother's son, but this would happen if the same boy had been adopted by the husband himself in his life-time or by another widow, after his death under his express authority. The consideration of incongruous relationship should not therefore justify the extension to widows of the converse of the rule which obtains in the case of a male making an adoption. The Dattaka Mimansa is no doubt a work of high authority on questions of adoption, but, as observed by their Lordships of the Privy Council in *Bhagwan*

1904

JAI SINGH  
PAL SINGHP.  
BIJAI PAL  
SINGH.

Banerji, J.

1904

JAI SINGH  
PAL SINGHv.  
BIJAI PAL  
SINGH.

*Singh v. Bhagwan Singh* (1) "to call it infallible is too strong an expression, and the estimates of Sutherland and of West and Buhler seem nearer the true mark." In some respects the view of Nanda Pandita has not been adopted by the Courts, and it seems to me that to adopt them in this instance would be unduly straining a rule which was manifestly laid down to govern adoptions by males only. For the above reasons I am unable, with due deference, to agree with the opinion expressed in the case of *Musammat Battas Kuar v. Lachman Singh* (2) and to hold that the adoption of the plaintiff by Lachman Kuar offends against Hindu law and is invalid. I also would therefore dismiss this appeal with costs.

By THE COURT:—The order of the Court is that the appeal be dismissed with costs.

*Appeal dismissed.*

1905

January 6.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice*

*Sir William Burkitt.*

MIHIN LAL (DEFENDANT) v. BADRI PRASAD (PLAINTIFF).\*

*Suit by co-sharer against lambardar for profits of his share—Limitation—Adverse possession—Nature of possession of lambardar.*

*Held* that the fact that a co-sharer plaintiff in a suit against the lambardar for his share of profits for three years antecedent to the suit has received no profits for twelve years previous to suit is not by itself sufficient to bar in the absence of evidence that the defendant lambardar was during the twelve years holding adversely to the plaintiff. *Raj Bahadur v. Bharat Singh* (3), followed. *Muhammad Husain v. Badri Prasad* (4), distinguished. *Mahadeo Prasad v. Raja Sawal Singh* (5), discussed.

THE suit out of which this appeal arose was brought to recover from the defendant a share in the profits of certain zamindari property of which the plaintiff alleged himself to be a co-sharer, the defendant being the lambardar. The facts found were that the share in respect of which the suit was brought formerly belonged to one Bhagwan Das, the plaintiff's predecessor in title. He died in 1888, having been in enjoyment of the profits of the property up to the time of his death. After the death of Bhagwan Das the property either did not

\* Appeal No. 42 of 1904, under section 10 of the Letters Patent.

(1) (1899) L. L. R., 21 All., 412.

(3) (1904) *Supra* p. 348.

(2) N.-W. P., H. C. Rep. 1875, p. 117.

(4) Weekly Notes, 1895, p. 88.

(5) L. P. A., No. 8 of 1902, decided 13th June 1902.

1905

MIHIN LAL

O.  
BADRI  
PRASAD.

yield any profits, or the profits were so small that the successors of Bhagwan Das did not trouble themselves about them. The lambardar, on the other hand, never denied the title of the plaintiff or set up an adverse title in himself until the year 1900. The Court of first instance (Assistant Collector of Etah) on these facts found that the defendant's plea of adverse possession could not be supported and on the merits decreed the plaintiff's claim, and on appeal the lower appellate Court (Officiating District Judge of Aligarh) affirmed this decision. The defendant appealed to the High Court where his appeal was dismissed by Banerji, J. He thereupon preferred the present appeal under section 10 of the Letters Patent.

Babu *Parbati Charan Chatterji*, for the appellant.

Munshi *Gulzari Lal*, for the respondent.

STANLEY, C. J., and BURKITT, J.—This is an appeal under section 10 of the Letters Patent against a judgment of a learned Judge of this High Court. The suit was brought by the plaintiff to recover from the defendant the share of profits of certain property of which the plaintiff alleged that he was a co-sharer. The Court of first instance decreed the claim, and this decree was affirmed on appeal by the lower appellate Court, and also by the learned Judge of this Court in second appeal. We are of opinion that under the circumstances of this case the decision of our learned brother was perfectly correct. It is a fact that the share of the property in respect of which the claim was brought formerly belonged to one Bhagwan Das, who was the predecessor in title of the plaintiff. He died in the year 1888. Up to the time of his death Bhagwan Das enjoyed the profits of his share. It is further found that after the death of Bhagwan Das the property either did not yield any profit, or that if it did yield any profit, the profit was so insignificant that the successors in title of Bhagwan Das did not trouble themselves in respect of it. It is further found that the appellant, who is the lambardar of the property, never denied the plaintiff's title or set up an adverse title in himself until the year 1900. Having regard to these facts the learned Judge of this Court held, concurring with the views of the lower Courts, that the plaintiff was entitled to succeed.

1905

MIHIN LAL  
v.  
BADRI  
PRASAD.

The present appeal has been preferred on the ground that, inasmuch as it was not established in evidence that at any time during twelve years previous to the suit the plaintiff had obtained any profits, his claim was barred by limitation. Reliance is placed in respect of this contention upon several authorities, to which we shall shortly refer. One of these is the case of *Muhammad Husain v. Badri Prasad* (1). In that case it was held by our brother Aikman that the mere circumstance that a co-sharer's name is recorded in the revenue papers will not prevent a suit by him for his share of profits being barred by limitation, if in fact he has received no profits for more than twelve years prior to the suit. On a perusal of the facts of that case it will appear that so long back as the 25th of August 1879, the lambardar set up an adverse claim to the property alleging that the plaintiff had not received any profits of the property for a period of twelve years. In his defence the lambardar set up an adverse title to the property. The learned Judge on appeal says with regard to the plea that in 1879 the defendant denied the plaintiff's title: "I would observe that it is not shown that it was in 1879 that the defendant first denied the plaintiff's title. From the defence in the former suit and from the fact that it is not shown that the plaintiff ever received any profits from the share, I infer that the defendant has all along denied the plaintiff's title." That case is not an authority in support of the proposition which is advanced on behalf of the appellant in this case. It was found in it as a fact that the defendant had all along denied the plaintiff's title. In the case before us it has been found as a fact that the defendant never denied the plaintiff's title or set up an adverse title in himself until the year 1900. Another case which has been relied upon on behalf of the appellant is the unreported case of *Mahadeo Prasad v. Raja Sarwal Singh* (2). In that appeal Blair and Aikman, JJ., concurring with Mr. Justice Knox, held that the current of authority is consistently in favour of the view taken by Knox, J. Mr. Justice Knox, in his judgment in second appeal, states that "there is a chain of rulings of this Court, extending from 1868 down to

(1) *Weekly Notes*, 1895, p. 88.

(2) L. P. A., No. 8 of 1902.

1905

MIHIN LAL

v.  
BADRI  
PRASAD.

the year 1895, in which it has been held consistently that a lambardar may obtain adverse possession of the share of a co-sharer by withholding and appropriating to his own use the profits thereof. The mere entry of a co-sharer's name does not give him a right to the profits in the absence of any reliable proof that he has enjoyed those profits at any time within twelve years prior to the institution of the suit." This dictum is pressed upon us as a decision that in any case where a co-sharer fails to establish that he has within a period of twelve years received the profits of his share his claim is barred by limitation. The language is undoubtedly susceptible of this meaning, but we are disposed to think that by the use of the words "withholding and appropriating to his own use the profits," the learned Judge intended to convey a refusal on the part of the lambardar after demand to pay any share of the profits to a co-sharer. If this be the meaning of the words, then we see no difficulty in accepting this as a true exposition of the law; otherwise we are unable to agree in the view expressed in the judgment.

We are disposed to accept the ruling of a Bench of this Court in *Raj Bahadur v. Bharat Singh* (1), in which this question was discussed. There it was held that the mere non-payment of the share of a co-sharer by the lambardar for a period of twelve years did not bar the right of the co-sharer subsequently to maintain a suit for the arrears due to him for the preceding three years, it not having been established that the lambardar or his predecessors in title ever claimed or set up an adverse title to the share in dispute to the exclusion of the plaintiff, or ever repudiated the right of the plaintiff or his predecessors in title to enjoy the profits of that share. We think that possibly the nature of the possession of a lambardar has been overlooked in the lower Courts. The possession of the lambardar is not adverse possession. It is only when a lambardar has set up an adverse claim or has repudiated the title of a co-sharer that his possession can be regarded as adverse. For these reasons we think the view of our learned brother in the appeal which was

1905

MIHIN LAL

v.  
BADRI  
PRASAD.

1905

January 6.

preferred to him is perfectly correct. We therefore dismiss the appeal with costs.

*Appeal dismissed.*

## REVISIONAL CIVIL.

*Before Mr. Justice Banerji.*

DHAN DEVI (PLAINTIFF) v. ZAMURRAD BEGAM AND ANOTHER  
(DEFENDANTS).\*

*Civil Procedure Code, section 283—Execution of decrees—Suit for declaration that property is liable to attachment and sale—Valuation of suit.*

A decree-holder holding a decree from a Court of Small Causes, which has been transferred to a Munsif for execution, attached certain property as that of the judgment-debtor. The judgment-debtor's wife objected under section 278 of the Code of Civil Procedure that the property was hers. This objection prevailed, and the property was released from attachment. The decree-holder then filed a regular suit against the objector and the judgment-debtor to have it declared that the property was liable to attachment and sale in execution of her decree. *Held* that the proper valuation of such suit for the purposes of jurisdiction was the amount of the decree under execution and not the value of the property attached. *Dwarkan Das v. Kameshar Prasad* (1) explained.

IN this case one Dhan Devi obtained a decree against Salwat Ali Khan from a Court of Small Causes for some two hundred rupees. The decree was transferred for execution to the Court of the Munsif of Fatehpur and certain immovable property was attached in execution thereof as the property of the judgment-debtor. Thereupon Zamurrad Begam, the wife of the judgment-debtor, preferred an objection under section 278 of the Code of Civil Procedure, claiming the property to be hers under a gift made to her by her husband. This objection was allowed and the property released from attachment. The decree-holder thereupon instituted the present suit in the Munsif's Court, under section 283 of the Code of Civil Procedure, for a declaration of his right to bring the attached property to sale in execution of his decree. The Munsif found that the suit was not within his jurisdiction, holding that the value of the suit for purposes of jurisdiction was the value of

\* Civil Revision No. 29 of 1904.

(1) (1894) L. L. R., 17 All., 69.



1905

DHAN DEVI

v.

ZAMUREAD  
BEGAM.

the property concerning which a declaration was sought, and that was above Rs. 1,000. He accordingly returned the plaint for presentation to the proper Court. On appeal from this order the lower appellate Court (District Judge of Cawnpore) took the same view as the Munsif and dismissed the appeal. The plaintiff thereupon preferred the present application for revision to the High Court contending that the valuation put by her upon her plaint was correct, and that the Munsif had therefore jurisdiction to try the suit.

Babu *Satya Narain*, for the appellant.

Maulvi *Muhammad Ishaq*, for the respondents.

BANERJI, J.—In this case the Court of first instance having held that the suit was not cognizable by that Court directed the plaint to be returned for presentation to the proper Court. This judgment of the Court of first instance having been affirmed in appeal by the lower appellate Court, this application for revision has been made by the plaintiff on the ground that the Courts below have erred in holding that the Munsif had no jurisdiction to hear the suit, and that the Court of first instance has thus failed to exercise a jurisdiction vested in it by law. The facts are these:—

The plaintiff obtained a decree from a Court of Small Causes for a sum amounting to about two hundred rupees. The decree was transferred for execution to the Court of the Munsif of Fatehpur and certain immovable property was attached as the property of the judgment-debtor. Thereupon, the first defendant, who is the wife of the judgment-debtor, preferred an objection under section 278 of the Code of Civil Procedure, claiming the property to be hers under a gift made to her by her husband. This application having been allowed, and the property released from attachment, the plaintiff decree-holder brought the present suit, in the Munsif's Court, under section 283 of the Code of Civil Procedure for establishment of his right to bring the attached property to sale in execution of his decree. The value of the property exceeds Rs. 1,000, but the amount of the decree, as I have said above, is much below Rs. 1,000. The Court of first instance has held that the value of the suit, *i.e.*, of the subject-matter of the suit is above

1905

DEHAN DEVI  
v.  
ZAMURRAD  
BEGAM.

Rs. 1,000, and that consequently the suit is not cognizable by the Munsif's Court.

That Court and the lower appellate Court have relied upon the ruling of this Court in *Dwarka Das v. Kameshar Prasad* (1). Both the Courts below have, in my judgment, misunderstood that ruling. It was held in that case that where the sole question between the parties to the suit is whether the property attached in execution of a decree is or is not liable to be attached and sold, the value of the suit is the value of the property sought to be sold in execution of the decree, when the amount of the decree exceeds the value of the property sought to be sold, but when the value of the property attached exceeds the amount sought to be realized, the value of the suit is the value of so much of the property sought to be sold as will, on sale, satisfy the amount sought to be realized by sale of the property sought to be sold. In the latter case the amount which is sought to be realized by sale under the decree may be taken as the value of that portion of the property, the sale of which will be sufficient to satisfy that amount by the sale. It was pointed out in that case that where the judgment-debtor is also a party to the suit, and the suit is by the unsuccessful claimant objector for the establishment of his right both against the execution creditor and the judgment-debtor, the value of the suit must be deemed to be the value of the attached property, although the amount of the decree may be smaller than the value of the property, but where the object of the suit is only to establish either the right of the decree-holder as against the objector or the right of the objector as against the decree-holder, the value of the subject-matter, where the amount of the decree is less than the value of the attached property, is the amount of the decree. The reason for this distinction is obvious. In the case of a suit by the objector against the judgment-debtor and the decree-holder where the objector does not limit his claim to so much of the property as would be sufficient for the realization of the amount of the decree, the judgment of the Court as between the objector and the judgment-debtor who are arrayed on opposite sides would operate as *res judicata* between

those persons, but that will not be the case where the execution creditor is the plaintiff and he seeks to establish his right against the objector alone, although he makes the judgment-debtor a formal defendant to the suit. In a suit of the description last mentioned the contest is only between the execution creditor on the one side and the successful objector on the other. What the decree-holder seeks by that suit is the establishment of his right to bring to sale so much of the property as would realize the amount of his decree, and, consequently, the value of the subject-matter of the suit must be the amount of the decree. As in the present case the amount of the decree is below one thousand rupees, and as the suit was brought by the decree-holder to establish his right as against the objector, the Munsif had jurisdiction to entertain the suit. I accordingly allow this application, set aside the orders of the Courts below with costs, and remand the case to the Court of first instance with directions to re-admit the plaint and try the case on the merits.

1905

DHAN DEVI

v.

ZAMURBAD  
BEGAM.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice  
Sir William Burdett.*

GHAZI-UD-DIN (DEFENDANT) v. BISHAN DIAL AND ANOTHER  
(PLAINTIFFS).\*

1905  
January 7.

*Civil Procedure Code, section 317—Execution of decree—Sale in execution—  
Suit by certified against real purchaser—Plea that the purchaser is  
benami for the defendant.*

*Held* that section 317 of the Code of Civil Procedure does not debar a person in possession of property purchased at auction sale held in execution of a decree, when sued for the rents and profits of such property by the certified purchaser, from setting up as a defence to the suit that the certified purchaser was only a benamidar on his behalf. *Bishan Dial v. Ghazi-ud-din* (1) discussed.

ONE Ghazi-ud-din, alleging that he had purchased certain property at auction sale held in execution of a decree *benami* in the name of Bishan Dial, sued Bishan Dial, asking for a declaration that he, Bishan Dial, was not the true owner of the property but merely the plaintiff's benamidar. This suit was ultimately dismissed as obnoxious to the rule laid down in section 317 of the Code of Civil Procedure. Subsequently, Ghazi-ud-din

\* Appeal No. 26 of 1904 under section 10 of the Letters Patent.


(1) (1901) I. L. R., 23 All., 175.

1905

GHAZI-UD-  
DIN  
v.  
BISHAN  
DIAL.

being in possession of the property purchased as mentioned above, and in receipt of the rents and profits thereof, Bishan Dial brought the present suit against Ghazi-ud-din to recover from Ghazi-ud-din the rents and profits of the property which had been the subject-matter of the earlier suit. Ghazi-ud-din set up as a defence that he was the real owner of the property and that Bishan Dial was merely a benamidar for him. The Court of first instance (Assistant Collector of Aligarh) held that this defence was not sustainable having regard to the provisions of section 317 of the Code of Civil Procedure, and the ruling of the High Court in the case of *Bishan Dial v. Ghazi-ud-din* (1), and on the merits decreed the plaintiff's claim. On appeal by the defendant the lower appellate Court (officiating District Judge of Aligarh) affirmed the decision of the Court of first instance. The defendant appealed to the High Court, where his appeal was dismissed by Banerji, J., who held in effect that the defendant was precluded by the decision in the former suit from setting up the defence now sought to be raised. From this decision the present appeal was preferred under section 10 of the Letters Patent.

Sir *Walter Colvin*, Mr. *M. L. Agarwala* and Mr. *R. K. Sorabji*, for the appellant.

 *E. O'Connor* and *Babu Sital Prasad Ghosh*, for the respondents.

STANLEY, C.J. and BURKITT, J.—With all deference we are unable to agree in the view expressed by the learned Judge of this Court who decided the second appeal from which this Letters Patent Appeal has been preferred. His decision is largely based upon the ruling of a Bench of this Court in a previous appeal between the same parties *Bishan Dial v. Ghazi-ud-din* (1). The circumstances out of which this litigation has arisen are shortly as follows. The appellant before us, Ghazi-ud-din, alleges that he purchased the property which is the subject-matter of the suit at an auction sale held in execution of a decree, which had been obtained against him, and that the purchase was carried out in the name of the plaintiff Bishan Dial as a benamidar for him. Bishan Dial was the

1905

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GHAZI-UD-  
DIN  
v.  
BISHAN  
DIAL.

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certified purchaser of the property at the sale. After the sale Ghazi-ud-din brought a suit against Bishan Dial to have him, Bishan Dial, declared a benamidar for him in the matter of the purchase, but the suit was dismissed on appeal to this High Court on the 15th of February 1901. In the lower Courts the plaintiff's claim had been decreed, but upon appeal the late Chief Justice Sir Arthur Strachey and our brother Banerji held that the decrees could not be supported, having regard to the provisions of section 317 of the Code of Civil Procedure. That section provides that "No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person or on behalf of some one through whom such other person claims." The suit which was instituted by Ghazi-ud-din was clearly brought in violation of the section to which we have referred, and when the case was brought on appeal to this High Court, it was properly dismissed on the ground that the suit was not maintainable. The learned Judges decided nothing more than this. The learned Chief Justice says:—"I think that the judgment of the lower appellate Court was wrong, and that the suit was barred by section 317 of the Code. I would therefore allow this appeal." Our brother Banerji in his judgment says:—"I agree in holding that section 317 of the Code of Civil Procedure is a bar to the maintenance of the present suit. The suit is one against certified purchasers on the ground that the purchase was made by them on behalf of the plaintiff. It therefore clearly comes within the purview of the first paragraph of section 317." The suit out of which the present appeal has been brought was brought by the plaintiff Bishan Dial to recover from the defendant the rents and profits of the property which was the subject-matter of the earlier suit. Of that property Ghazi-ud-din was in possession at the date of the auction purchase, and he has continued in possession up to the present time. He has set up the defence in the present suit that he is the real owner of the property, and that Bishan Dial the plaintiff is a benamidar for him. It was contended in the Courts below and also in the High Court that the determination of the appeal in the earlier suit to which we

1905

GHAZI-UD-  
DIN  
v.  
BISHAN  
DIAL.

have referred debarred the defendant Ghazi-ud-din from setting up the defence that Bishan Dial was a benamidar for him. This contention has found favour in all three Courts. It appears to us that in acceding to this contention the Courts have enlarged the scope of section 317.

That section merely directs that a suit against a certified purchaser shall not be maintained. It does not go on to provide that a suit by a certified purchaser against a person in possession for rents and profits, or for possession of the property of which he has been recorded as the certified purchaser, cannot be resisted on the ground that the certified purchaser is only a benamidar.

We are not prepared to extend the operation of the section beyond what the Legislature has purported to do. The learned Judge of this Court in his judgment says :—"It is true that if the present plaintiffs had brought the suit to which I have referred (we take the learned Judge to mean by this, if the plaintiff had been plaintiff in the earlier suit) the present defendant might have resisted the claim upon the ground that the plaintiffs, the certified purchasers, were his benamidars, but since he chose to bring a suit for a declaration that the plaintiffs were his benamidars, and he failed in that suit, he is not entitled to re-open the question of his title." We are in full agreement with our learned brother in this. The decision of the Court in the earlier suit only amounted, as we have said, to a ruling that that suit was not maintainable. It did not go into the merits of the case, or consider the rights of the parties, and therefore we are wholly unable to see how it can be held to debar the defendant from setting up any defence he may desire. It left the plaintiff in that suit exactly in the position in which he was when the suit was instituted, a position in which as we think, if his benamidar sought to enforce any right against him, he might properly set up his beneficial ownership as a defence to the suit. For these reasons it appears to us that the judgment of this Court and also the judgments of the lower Courts cannot be supported. We therefore set aside these decrees, and, the case having been decided on a preliminary point, remand it to the Court of first instance,



through the learned District Judge, with a direction that it be restored to its original place in the list of pending cases and be tried on the merits. The Court will see that the defendant has an opportunity of setting up the defence which he has raised in his written statement, namely, that he is the real owner of the property and that the plaintiff was merely his benamidar, and must determine whether or not this defence is well founded. The appellant will have the costs of this appeal in any event. All other costs will abide the event.

*Appeal decreed and cause remanded.*

1905

GHAZI-UD-  
DIN  
v.  
BISHAN  
DIAL.

## APPELLATE CIVIL.

1905

January 7.

*Before Sir John Stanley, Knight, Chief Justice.*

NEPAL RAI AND OTHERS (DEFENDANTS) v. DEBI PRASAD AND OTHERS  
(PLAINTIFFS) AND SHEOMBAR KOERI (DEFENDANT) \*

*Act No. VII of 1870 (Court Fees Act), section 7, ix; schedule I—Court fee—  
Suit for redemption of mortgage—Appeal in respect of a specified portion  
of the sum declared payable for redemption.*

In a suit for the redemption of a mortgage the plaintiff obtained a decree for redemption conditional on the payment by him of a sum fixed by the decree. The plaintiff appealed upon the ground that such sum was in excess by a specified amount of the sum rightly payable by him for redemption. *Held* that the court-fee payable on the memorandum of appeal calculated according to the sum which the appellant claimed to have deducted from his decree, and not, as in the case of a suit for redemption, according to the principal sum secured by the mortgage *Pirbhu Narain Singh v. Sita Ram* (1) *quoad hoc* dissented from.

IN this case, after the appeal to the High Court had been admitted, a report was made by the office under rule 19A of the Rules of Court of the 18th of January 1898 to the effect that the memorandum of appeal presented to the lower appellate Court had not been sufficiently stamped. No objection having been taken by the appellant to this report within the three weeks allowed by rule 19A, the report was "laid before the Court for orders." The facts out of which the reference arose are fully stated in the order of the Court.

\* Stamp Reference in Second Appeal No. 374 of 1904.

(1) (1890) I. L. R., 13 All., 94.

1905

NEPAL RAI

v.

DEBI  
PRASAD.

Munshi Gobind Prasad, for the appellant.

Babu Sital Prasad Ghose, for the respondent.

STANLEY, C. J.—This matter comes before the Court on an objection raised by the plaintiffs appellants to the report of the office in regard to an alleged insufficiency of the court fee paid in the lower appellate Court. The suit was one for redemption of a mortgage of the 3rd of November 1890 on payment of a sum of Rs. 499-15-0, the principal money expressed to be secured by the mortgage. The plaintiffs succeeded, and obtained a decree for redemption, but upon payment of a sum of Rs. 1,155-14-0. The plaintiffs, considering that this amount exceeded the amount properly payable under the security by a sum of Rs. 288-11-0, preferred an appeal to the lower appellate Court, and valued their appeal at the sum of Rs. 288-11-0, the sum in dispute, and paid the proper court fee on an appeal of that value. On appeal to this Court the office reported that the court fee paid in the lower appellate Court was insufficient, inasmuch as under section 7 (ix) of the Court Fees Act in a suit for redemption of a mortgage the court fee is estimated according to the principal money expressed to be secured by the instrument of mortgage. The objection of the office was based upon a ruling of my predecessor, Sir John Edge, in the case of *Pirbhu Narain S. Sita Ram* (1), and having regard to that decision was properly made. The objection that has been filed to the report is that in the case of an appeal in a redemption suit the court fee payable is not to be calculated upon the principal money expressed to be secured by the instrument of mortgage when the appeal is only concerned with a definite portion of the sum declared by the Court below to be payable in respect of the mortgage. The contention is that the amount or value of the subject-matter in dispute in the appeal is an ascertained sum, viz., Rs. 288-11-0, and that where the amount is so ascertained the court fee payable is an *ad valorem* fee.

The question is one of some difficulty, but having given it the best thought that I can, I have come to the conclusion that the view expressed by my learned predecessor is open to doubt; and that a contrary view which was expressed by my brother

Burkitt in a later unreported case of *Lala Rup Kishori v. Maya Ram* (Second Appeal No. 1225 of 1893) is correct. The facts of that case (S.A. No. 1225) were, so far as I can see, in substance identical with those of the present case. My brother Burkitt held in that case that the case decided by Edge, C. J., to which I have referred, was not in point. As to this, I must confess that I am unable to distinguish the two cases. He held in that case that the court fee was payable only on the amount at issue in the appeal.

It appears to me, upon a perusal of section 7 of the Court Fees Act and schedule I to that Act, that in a case such as the one before me the court fee is to be calculated on the value of the subject-matter in dispute only. Section 7, sub-section (ix), provides that in suits against a mortgagee for the recovery of the mortgaged property the court fee is to be valued according to the principal money expressed to be secured by the instrument of mortgage. The section is confined to a suit apparently, and not to an appeal. In schedule I to the Act we find that in the case of a plaint or memorandum of appeal not otherwise provided for in the Act, except those mentioned in section 3, an *ad valorem* fee is payable at the rate mentioned in that schedule. In this schedule a memorandum of appeal is specifically mentioned, while in section 7 of the Act a memorandum of appeal is not mentioned. Therefore, I think it that if in the case of an appeal the value of the subject-matter of the appeal can be determined, as it has been in this case, the appellant is only bound to pay a court fee on the amount ascertained to be the value of the subject-matter of the appeal. For these short reasons it appears to me that the view expressed by my brother Burkitt, in the case decided by him, to which I have referred, is correct, and therefore I allow the objection raised before the Court, and declare that the court fee paid in the lower appellate Court is sufficient.

I

NEPAL RAI

v.

DEBI  
PRASAD

1905  
January 16.

*Before Mr. Justice Blair and Mr. Justice Banerji.*

BANH BAL (JUDGMENT-DEBTOR) v. MANNI LAL (DECREE-HOLDER).<sup>\*</sup>  
*Act No. IV of 1882 (Transfer of Property Act), section 99—Civil Procedure Code, section 233—Mortgagee holding also a simple money decree against mortgagor—Transfer of decree—Rights of transferee.*

H., the holder of a usufructuary mortgage over the property of B., obtained against B. a simple money decree which had nothing whatever to do with the mortgage or the debt secured thereby. H. transferred this simple money decree to M. Held that there was nothing to prevent M. from bringing to sale in execution of this decree the property mortgaged by B. to H. *Chundra Nath Dey v. Burroda Shoondury Ghose* (1) distinguished.

ONE Hargun, who was the holder of a usufructuary mortgage over certain property belonging to Banh Bal, obtained a simple money decree against Banh Bal. This simple money decree Hargun sold to Manni Lal, and Manni Lal sought to execute it by bringing to sale the property mortgaged to Hargun. Manni Lal's application for execution was resisted by Banh Bal, who objected that his rights in the property mortgaged to Hargun could not be sold. The Court of first instance (Subordinate Judge of Agra) accepted this contention and dismissed the decree-holder's application; but on appeal the District Judge reversed the order of the first Court and allowed execution to proceed. The judgment-debtor thereupon appealed to the High Court.

*For appellant, Baldeo Ram Dave, for the appellant.*

*For respondent, B. Sarbadhicary, for the respondent.*

BLAIR and BANERJI, JJ. — This appeal arises out of an application for execution of a simple decree for money, obtained against the appellant by one Hargun, who subsequently assigned it to the respondent Manni Lal. The appellant had made a usufructuary mortgage of his property to Hargun. The decree, however, had no reference to the mortgage or to the debt secured by the mortgage. In execution of the decree of which he was the assignee the respondent sought to bring to sale the equity of redemption of the appellant in respect of the property of which Hargun was the usufructuary mortgagee. It was contended on behalf of the appellant that Manni Lal was not

<sup>\*</sup> First Appeal No. 54 of 1904 from an order of W. F. Walls, Esq., District Judge of Agra, dated the 21st of January 1904.

1905

BANH BAI

v.  
MANNI  
LAL.

entitled to bring to sale the equity of redemption of the appellant, and reliance was placed upon the provisions of section 99 of Act No. IV of 1882. This objection found favour with the Court of first instance but it was overruled by the lower appellate Court. The same objection has been repeated before us. It may be that if Manni Lal had been the assignee of the rights of Hargun as mortgagee, section 99 of Act No. IV of 1882 would have precluded him from seeking the sale of the mortgaged property in execution of the money decree of which he was the assignee. But it must be remembered that he did not acquire the rights which existed in Hargun under the mortgage to which we have referred above. His position at present is not different from that of a third person who has obtained a simple decree for money against the mortgagor of Hargun and seeks to sell the equity of redemption of the mortgagor. There can be no doubt that on the application of a third person who is not a mortgagee from the judgment-debtor the equity of redemption of the mortgagor can be sold, and his application would not offend against the provisions of section 99 of the Transfer of Property Act. We can see no difference between the position of a third person obtaining a simple money decree against the mortgagor and that of an assignee of a money decree obtained by the mortgagee, but not in his capacity as mortgagee. The learned vakil who appeared for the appellant referred to the ruling of the Calcutta High Court in *Chundra Nath Dey v. Burroda Shoondury Ghose* (1). That case in our judgment is distinguishable from the present one. There the decree which was assigned to the applicant for execution declared a charge in favour of the decree-holder upon the property of the mortgagor for the amount of the decree. It was this decree including the charge which was assigned to the applicant for execution. As the assignee himself thus became the holder of the charge, he could not sell the equity of redemption without violating the provisions of section 99. It was therefore held that that section would preclude him from proceeding against the mortgaged property. In the present case the respondent has nothing to do with the mortgage held

(1) (1895) I. L. R., 22 Cal., 818.

1905

BANH BAI

v.  
MANNI  
LAL.

by Hargun. He has acquired no rights in respect of that mortgage, and therefore by seeking a sale of the equity of redemption he has in no way transgressed the provisions of section 99 of Act No. IV of 1882. We do not think that section 233 of the Code of Civil Procedure helps the appellant. In our judgment the Court below was right and we dismiss the appeal with costs.

*Appeal dismissed.*

1905

January 17.

*Before Mr. Justice Blair and Mr. Justice Banerji.*

BALMAKUND (OPPOSITE PARTY) v. KUNDAN KUNWAR  
(APPLICANT).\*

*Act No. VII of 1889 (Succession Certificate Act), section 7 (3)—Application for certificate to collect debts—Objection as to status of family of deceased—Inquiry necessary.*

Where, on an application for a certificate to collect debts due to a deceased person made by the widow, an objection was filed by a nephew of the deceased that he and the deceased were members of a joint Hindu family and therefore no certificate could be granted to the widow: it was held that the Court was bound to make some inquiry, not necessarily an exhaustive one, into the facts set up by the objector, and was not warranted in passing an order granting a certificate without making any inquiry at all.

IN this case Musammat Kundan Kunwar, as the widow of Tirbeni Sahai, deceased, applied to the District Judge of Bareilly for the grant of a certificate under Act No. VII of 1889, enabling her to collect certain debts due to the deceased. The application was opposed by Balmakund, a nephew of the deceased, who alleged that he and the deceased were members of a joint Hindu family, and therefore no certificate could be granted to the widow. The District Judge, however, granted a certificate to the widow, remarking as to the question raised by the objector:—"This raises an intricate and difficult question of law and facts which I do not feel called upon to decide by summary proceedings. I find that Musammat Kundan Kunwar has *prima facie* the best title to the certificate, and it will be granted to her." Balmakund appealed to the High Court, urging that the Judge was bound to make some sort of an inquiry into the question raised by the objector.

\* First Appeal No. 80 of 1904, from an order of J. S. Campbell, Esq., District Judge of Bareilly, dated the 18th of March 1904.



Dr. *Satish Chandra Banerji*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondent.

BLAIR and BANERJI, JJ.—This is an appeal against the grant of a certificate to the respondent under Act No. VII of 1889. The certificate is for the collection of debts. The proceedings are summary proceedings, and no doubt the Judge would not be called upon to enter into and decide the rights of the parties as if he were trying a suit. But it is manifest to us that to pass a sound judicial decision he is bound at all events to enter into some inquiry. In the present case there was a dispute as to whether the family was joint or not. That question he did not touch. It is quite true that under the provisions of the Act he need not sift this. But he should base his decision upon *prima facie* evidence with which he is sufficiently satisfied. He has not done so. In this case he did not enter upon any inquiry at all. His order cannot therefore be maintained, and we must send back the case with the direction that he should make some inquiry according to law, and upon the result of the inquiry pass an order. We accordingly set aside the order of the Court below and send the case back to it to deal with it according to law. Costs will follow the event.

*Appeal decreed and cause remanded.*

1905

BADMAKUND

v.  
KUNDAN  
KUNWAR.

*Before Mr. Justice Banerji.*

MAHIP RAI (PLAINTIFF) v. DWARKA RAI (DEFENDANT).\*

1905

January 18.

*Civil Procedure Code, section 331—Execution of decree—Resistance or obstruction by person other than the judgment-debtor—Investigation of claim—Nature of investigation.*

A Court investigating, under the provisions of section 331 of the Code of Civil Procedure, a claim to property sought to be taken in execution of a decree is not confined to the mere question of possession but is bound to decide on the title to the property in dispute. *Moulakhan v. Gorikhan* (1), *Bapujirao v. Fatesing Shahaji Bhosle* (2) and *Rucha Rao v. Purmeshur Dyal* (3), followed.

\* Second Appeal No. 603 of 1903, from a decree of Syed Muhammad Tajammul Husain, Subordinate Judge of Ghazipur, dated the 17th of April 1903, reversing a decree of Munshi Tara Prasad, Munsif of Saidpur, dated the 15th of December 1902.

- (1) (1890) I. L. R., 14 Bom., 627. (2) (1897) I. L. R., 22 Bom., 967.  
(3) N.-W. P., H. C. Rep., 1870, 252.

1905

MAHIP  
RAI  
v.  
DWARKA  
RAI.

ONE Mahip Rai having obtained a decree for possession of certain immovable property against Mathura Rai and Tilakdhari Rai, was resisted in attempting to obtain possession by Dwarka Rai, who alleged that he was in proprietary possession thereof. A report was made by the Civil Court Amin under section 328 of the Code of Civil Procedure, and subsequently thereto proceedings were started under section 331 of the Code. The Court of first instance (Munsif of Saidpur) went into the question of Dwarka Rai's alleged title to the land in dispute, and finding that he had none which would support his resistance to the execution of Mahip Rai's decree passed an order accordingly directing that execution should proceed. Dwarka Rai appealed. The lower appellate Court (Subordinate Judge of Ghazipur) considering, with reference to the ruling in *Rakhan Churn Mundul v. Watson & Co.* (1), that in an investigation under section 331 of the Code of Civil Procedure the question of possession alone could be gone into, and, finding Dwarka Rai to be in possession, reversed the decision of the Munsif and dismissed the decree-holder's application. From this decision the decree-holder appealed to the High Court.

Munshi Gobind Prasad, for the appellant.

Mr. S. Sinha (for whom Dr. Tej Bahadur Sapru), for the respondent.

II, J.—The plaintiff appellant, having obtained a decree for possession of immovable property against Mathura Rai and Tilakdhari Rai, applied for execution of his decree. He was resisted by the respondent Dwarka Rai, who claimed to be in possession of the property on his own account. Thereupon, in accordance with the provisions of section 331 of the Code of Civil Procedure, the claim was registered as a suit between the decree-holder as plaintiff and the claimant as defendant. The Court of first instance tried the question of title raised by the parties and made a decree in favour of the plaintiff. Upon appeal by the defendant the lower appellate Court found that the defendant was in possession at the time of obstruction, and without entering upon a determination of the question of title dismissed the suit. The learned Subordinate Judge says in his

judgment:—"Having regard to the nature of the case, it is only necessary to see, and it should only be proved, which party was in possession at the time of obstruction, irrespective of the fact, what was the state of things previous to that time." In so holding, the learned Subordinate Judge was clearly in error. Section 331 directs that the Court shall proceed to investigate the claim in the same manner and with the like power as if a suit for the property had been instituted by the decree-holder against the claimant under the provisions of Chapter V. It further provides that the order of the Court shall have the same force as a decree, and shall be subject to the same conditions as to appeal. It is thus manifest that a Court trying a suit under section 331 must try it as a suit for the property, and determine the question of title also. As the order of the Court has the force of a decree, and is appealable as such, there cannot be any doubt that the Legislature did not intend that the order should be confined to the question of possession only. This is further manifest upon a comparison of the provisions of section 331 with those of section 332. If in execution of a decree for possession of immovable property any person other than the judgment-debtor is dispossessed, the person so dispossessed may make an application to the Court under section 332, and upon such application being made, the Court is required to confine itself to an investigation of the ~~facts~~ of dispute specified in the first paragraph of the section, viz., that the property was *bond fide* in the possession of the claimant on his own account or on account of some person other than the judgment-debtor, and that it was not comprised in the decree; or if it was comprised in the decree, that he was not a party to the suit in which the decree was passed; and then the section provides that the party against whom an order is passed under the section may institute a suit to establish his right. Had the Legislature in enacting section 331 intended that the investigation under that section should be limited only to the question of possession, one would have expected to find in the section a provision similar to that contained in the last paragraph of section 332. There is another circumstance which unmistakeably shows that the Legislature

1905

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MAHIP  
RAI  
v.  
DWARKA  
RAI.

1905

MAHIP  
RAI  
v.  
DWARKA  
RAI.

intended that all questions between the parties, including the question of title, should be tried in a suit under section 331 in the same way as in an ordinary suit. In Act No. X of 1877 it was provided in section 331 that the claim of a person who resisted the execution of a decree for possession should be registered as a suit, and investigated by the Court with the like power as if a suit had been brought against the claimant under the provisions of section 9 of the Specific Relief Act, 1877; so that the investigation was to be confined to the question of possession only. This provision, however, was repealed by Act No. XII of 1879, and the provisions of that Act, which in this respect were almost the same as those of Act No. VIII of 1859, were re-enacted in Act No. XIV of 1882, the present Code of Civil Procedure. The provisions of section 331 of Act No. X of 1877 were undoubtedly repealed with an object, and that object, it is clear, was that a trial under section 331 should be a trial upon the question of title also. This view is supported by the ruling of the Bombay High Court, in *Moulakhan v. Gorikhan* (1), which was approved and followed in *Bapujirao v. Fatesing Shahaji Bhosle* (2). With reference to the provisions of section 229 of Act No. VIII of 1859 this Court held in *Rucha Rae v. Purmeshur Dyal* (3), that under that section the question of title was also to be tried and not merely the question of *bona fide* possession. As I have already said, the provisions of section 229 of Act No. VIII of 1859 are almost in terms similar to those of section 331 of the present Code of Civil Procedure. This ruling is therefore an authority of this Court in favour of the appellant's contention. For the above reasons I am of opinion that the lower appellate Court should have tried and determined the question of title also. I accordingly allow the appeal, set aside the decree of the lower appellate Court, and, as that Court decided the case upon a preliminary point, I remand the case under section 562 of the Code of Civil Procedure to that Court with directions to re-admit it under its original number in the register and proceed to determine it according to law. The appellant will have his costs of this appeal. Other costs will follow the event.

*Appeal decreed and cause remanded.*

(1) (1890) I. L. R., 14 Bom., 627. (2) (1897) I. L. R., 22 Bom., 967.

(3) N.-W. P. H. C. Rep., 1870, p. 252.

*Before Mr. Justice Banerji.*

KHATUN BIBI (PLAINTIFF) v. SAYIDA BIBI (DEFENDANT).\*

*Pre-emption—Wajib-ul-arz—Construction of document.*

1905  
January 19.

Where a wajib-ul-arz gave a right of pre-emption on transfer of a share, first, to a co-sharer who was a collateral relative, then to a co-sharer in the patti, and then to a co-sharer in the mahal, "for the price offered by a stranger," it was held that no right of pre-emption accrued to a co-sharer of a superior class when the sale was to a co-sharer of an inferior class; but the right only came into existence when the sale was to a stranger. *Sheo Balak Singh v. Lachmidhar* (1) referred to. *Sukhdeo Singh v. Bahadur Singh* (2) distinguished.

IN this case one Ali Ahmad sold his share in mauza Dandpur, thok Husaini Bibi, patti Mir Talib Ali, to Sayida Bibi. On this sale a suit for pre-emption was brought by Khatun Bibi alleging that she had a preferential right to that of the vendee. The vendee was a co-sharer in thok Husaini Bibi, but in a different patti, whereas the plaintiff pre-emptor was a co sharer in the same patti as that in which the share sold was. The wajib-ul-arz of the village, under the provisions of which the right of pre-emption was claimed, gave a right of pre-emption, first to a co-sharer who was a collateral relative of the vendor, then to a co-sharer in the patti, and then to a co-sharer in the mahal, *for the price offered by a stranger*.

The Court of first instance (Subordinate Judge of Allahabad) decreed the plaintiff's claim, holding that the wajib-ul-arz gave a right of pre-emption amongst the various classes of ~~persons~~ *inter se*. The defendant vendee appealed. The lower appellate Court (District Judge of Allahabad) taking a different view of the wajib-ul-arz held that the right of pre-emption only arose on a sale to a stranger, and not when the sale was by a member of one class of co-sharers to a member of any other class, and accordingly reversed the decision of the Subordinate Judge and dismissed the plaintiff's suit. In so doing the District Judge relied on the ruling of the High Court in *Sheo Balak Singh v. Lachmidhar* (1). The plaintiff thereupon appealed to the High Court.

\* Second Appeal No. 547 of 1903 from a decree of C. Rustomji, Esq., District Judge of Allahabad, dated the 24th of March 1903, reversing a decree of Maulvi Muhammad Abbas Ali, Subordinate Judge of Allahabad, dated the 29th of July 1901.

(1) (1901) I. L. R., 23 All., 427. (2) Weekly Notes, 1904, p. 104.

1905

KHATUN  
BIBI  
v.  
SAYIDA  
BIBI.

Pandit *Moti Lal Nehru* (for whom Babu *Labit Mohan Banerji*), for the appellant.

Munshi *Gulzari Lal*, for the respondent.

BANERJI, J.—The only question in this appeal, which arises out of a suit for pre-emption brought on the basis of a *wajib-ul-arz*, is that of the interpretation to be put on that document. It is difficult to distinguish this case from that of *Sheo Balak Singh v. Lachmidhar* (1). Each case must depend on the terms of the particular *wajib-ul-arz* on which the suit is founded. In this case the purchaser is a co-sharer in the village, but not in the same *patti* with the vendor. The plaintiff pre-emptor is a co-sharer in the *patti* and for this reason claims priority over the vendee. The question is whether a right of pre-emption arises under the *wajib-ul-arz* of the village in question, unless a sale is made to a person who is stranger to the village. The clause in the *wajib-ul-arz* relating to pre-emption begins with the recital that “for such price as a stranger (*shakhs ghair*) may pay” pre-emption may be claimed by the three classes of persons mentioned in the document. The intention, therefore, seems to be that it is only when the sale is made to a stranger that the right of pre-emption arises. In this respect the provisions of this *wajib-ul-arz* are different from those of the *wajib-ul-arz* in the case of *Sukhdeo Singh v. Bansi Singh* reported in the Weekly Notes of 1904, at page 104, and the other case reported in the foot-note on page 105. The *wajib-ul-arz* in each of those cases made no reference to a stranger, but simply provided that the price to be paid by the pre-emptor was to be the same as that paid by any other person, that is to say, by any other purchaser, whether a stranger or not. The use of the word “stranger” in the *wajib-ul-arz* in the present case indicates, as I have already said, that no right of pre-emption could arise unless the sale was to a stranger. The lower appellate Court therefore placed a right interpretation on the *wajib-ul-arz*, and I dismiss this appeal with costs.

*Appeal dismissed.*



*Before Mr. Justice Blair and Mr. Justice Banerji.*

ASAD-UL-LAH (DEFENDANT) v. MUHAMMAD NUR (PLAINTIFF).\*

*Civil Procedure Code, sections 508, 514, 516, and 521—Arbitration—Award—Validity of award made, but not reaching the Court within the time limited.*

1905  
January 23.

In the case of an arbitration made under the order of a Court it is sufficient if the award be made, that is, completed and signed by the arbitrators, within the period limited under section 508 of the Code of Civil Procedure; it is not necessary to the validity of such award that it should actually reach the hands of the Court within such period. *Arunugam Chetti v. Arunachalam Chetti* (1) and *Umersey Premji v. Shamji Kanji* (2) followed. *Raja Har Narain Singh v. Chaudhrain Bhagwant Kuar* (3) referred to. *Behari Das v. Kalian Das* (4) dissented from.

IN this case the matter in dispute in a suit in the Munsif's Court at Amroha was referred to arbitration, and the 6th of January, 1904, was fixed by the Court as the date for delivery of the award. The award was completed and signed on the 6th of January, but was not actually handed in to the Court until the 7th. The Munsif overruled the plaintiff's objections, and in accordance with the award dismissed the suit. On appeal by the plaintiff the lower appellate Court (Additional Subordinate Judge of Moradabad) held that the award was invalid having regard to the last clause of section 521 of the Code of Civil Procedure, and allowing the appeal, remanded the case under section 562 of the Code. The defendant appealed against this order of remand to the High Court.

Mr. *Abdul Majid*, for the appellant.

Mr. *Karamat Husain*, for the respondent.

BLAIR and BANERJI, JJ.—The appeal now before us arises out of proceedings in which the Court of first instance had passed a decree in terms of an award. The arbitration which terminated in the award was one made by the order of the Court. The Court, as we gather from the judgment, meant to specify the date, to wit, the 6th of January, 1904, as the last date for the making and delivery of the award. The award was made on the 6th of January in the sense that it was completed

\* First Appeal No. 83 of 1904, from an order of Maulvi Muhammad Shafi, Additional Subordinate Judge of Moradabad, dated the 9th of June, 1904.

(1) (1898) I. L. R., 22 Mad., 22.

(2) (1888) I. L. R., 13 Bom., 119.

(3) (1891) I. L. R., 13 All., 300.

(4) (1886) I. L. R., 8 All., 543.

1905

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ASAD-UL-  
LAH  
v.  
MUHAMMAD  
NUR.

and signed by the arbitrators on the 6th. But it was not handed to the Court until the 7th. The Court of first instance passed judgment according to the award. The Court of first appeal held that the award was invalid, not having been delivered on the 6th of January or earlier; set aside the decree of the Court of first instance, and passed an order of remand with directions to the Court of first instance to try the case on the merits. It is contended in this appeal that the filing of the award beyond time was immaterial so long as the award was made and signed and published on the date specified as the last date for that purpose. Our attention has been called to the sections of the Code of Civil Procedure bearing upon this matter. The variation in the language used in these sections raises some difficulty as to the true intent and meaning of the Statute. Section 508, which gives the Court power to refer a matter to arbitration, says that the Court "shall fix such time as it thinks reasonable for the delivery of the award." Section 514 provides that if the "arbitrator cannot complete the award within the period specified in the order, the Court may, if it thinks fit, grant a further time, and from time to time enlarge the period for the delivery of the award." There apparently the completion and delivery of the award are not distinguished one from the other. Section 516 provides that "when an award in a suit has been made by the persons who made it shall sign it and cause it to be filed in Court." We have here three steps: the making, the signing, and the filing. Obviously the word 'made' is used in the untechnical sense, because the award cannot be considered as made unless it is authenticated by the signature of the person who made it. 'Made' means that the mind of the arbitrator has been declared, and such declaration requires authentication by signature. Section 521 seems to us to be the section which governs the case before us. It provides that no award shall be set aside except on one of the grounds mentioned in the section, one being that the award was 'made' after the issue by the Court of an order superseding the arbitration. It is manifest that the word 'made' used here does not mean delivery because 'making' and 'delivery' indicate different stages. The section further provides that "no award

shall be valid unless 'made' within the period allowed by the Court." It seems to us that that is the governing section applicable to this case. The validity of the award depends upon the making of it within the period allowed, and it is immaterial on what date it is filed. The same view has been taken by the Madras High Court in *Arumugam Chetti v. Arunachalam Chetti* (1), and the Bombay High Court in *Umersey Premji v. Shamji Kanji* (2). A case in some respects similar was decided by a Bench of this Court, *Behari Das v. Kalian Das* (3). In that case it was held that the award made in the case was invalid and the opinion was expressed that "the rule that no award shall be valid unless made within the period fixed by the Court is equivalent to a rule that the award must be delivered within that period." From that opinion we feel bound to differ. We think that the Madras and Bombay Courts were right in the conclusion at which they arrived. That conclusion is in accordance with the judgment of the Privy Council in *Raja Har Narain Singh v. Chaudhrain Bhagwant Kuar* (4). In the case reported in I. L. R., 8 All., 543, it was unnecessary for the Court to rule upon the question whether an award made within time is invalidated by a late filing of it, because in that case the award had not been made by all the arbitrators within the time limited by the order. The Court below was wrong. We accordingly allow the appeal, set aside the order of the Court below, and restore the decree of the Court of first instance with costs in all Courts.

1905

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ASAD-UL-  
LAH  
v.  
MUHAMMAD  
NUB.

*Appeal decreed.*

- (1) (1898) I. L. R., 22 Mad., 22.  
(2) (1888) I. L. R., 13 Bom., 119.

- (3) (1891) I. L. R., 8 All., 543.  
(4) (1886) I. L. R., 13 All., 300.

1905

January 23.*Before Mr. Justice Blair and Mr. Justice Banerji.*SIKANDAR AND OTHERS (DEFENDANTS) v. BAHADUR AND OTHERS  
(PLAINTIFFS).\**Act No. III of 1877 (Indian Registration Act), sections 3 and 17—Act No. IV of 1882 (Transfer of Property Act), section 107—Immovable property—Definition—Lease of right to receive market dues.*

*Held* that the right to collect market dues upon a given piece of land is a benefit to arise out of land within the purview of section 3 of the Indian Registration Act, 1877. A lease, therefore, of such right for a period of more than one year must be made by registered instrument.

THE facts of this case are as follows :—

The plaintiffs sued for a declaration that they were entitled to recover 70 out of 76½ sihams of the income of a cattle market held every Monday in qasba Atrauli by virtue of an unregistered lease dated the 28th of June 1902 alleged to have been granted to them by Akbar Ali Khan and others, zamindars. The lease was for a term of three years. The defendants pleaded, *inter alia* that registration of this lease was compulsory, and that, as it was not registered, it was inadmissible in evidence. The plaintiffs relied upon a *qabuliat* executed by them, which was registered. The Court of first instance (Munsif of Haveli, Aligarh) held that the lease was inadmissible, and the *qabuliat* could not be relied upon by the plaintiffs as giving them any title, and accordingly dismissed the suit. On appeal, however, this decision was reversed by the lower appellate Court (Extra Additional Subordinate Judge of Aligarh) which decreed the appeal and remanded the suit for trial on the merits. Against this order of remand the defendants appealed to the High Court.

Munshi Gobind Prasad, for the appellants.

Maulvi Ghulam Mujtaba, for the respondents.

BLAIR and BANERJI, JJ.—The suit out of which this appeal arises was one brought by the plaintiffs for a declaration of their right and title to certain market dues which they alleged had been leased to them by the zamindars. The defendants are persons who claim under some similar title. That which is conveyed appears to have been a right to enter temporarily upon

\* First Appeal No. 55 of 1904, from an order of Maulvi Muhammad Shafi, Extra Additional Subordinate Judge of Aligarh, dated the 31st of March, 1904.

1905

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SIKANDAR  
v.  
BAHADUR.

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certain land upon which a weekly fair was held and to receive the dues, which but for the execution of some document of transfer would have been received by the landlords themselves. The transaction between the parties is in the form as usual of a *patta* signed by the zamindars and a *gabuliat* by the so-called lessees. The *patta* was not registered, and the *gabuliat* was. The defendants objected to the admissibility of the unregistered *patta*, and contended that, inasmuch as that document was unregistered it transferred nothing, and could not be used as evidence of a transfer. To that contention the Court of first instance acceded and dismissed the plaintiff's suit. The lower appellate Court reversed that decision and remanded the case under section 562 of the Code of Civil Procedure for trial on the merits. It is against that order that the present appeal is brought. On behalf of the appellants it is urged that by virtue of section 107 of Act No. IV of 1882 and also by dint of section 17, clause (d) of the Registration Act such a lease could be made only by a registered instrument, the lease being one of immovable property for a term exceeding one year and reserving yearly rent. Our attention is called to the definition of immovable property contained in section 3 of the Registration Act. It has been contended on behalf of the respondents that the interest purporting to be transferred by the lease in the present case did not fall within the definition of immovable property as given in section 3 of the Registration Act. Among the classes of property included in that definition is to be found, after the last of the specific classes of property set forth, the general term "any other benefit to arise out of land." Therefore the principal question we have to consider is whether the right to collect dues upon a given piece of land, the property of the alleged lessor, is a benefit to arise out of land within the purview of section 3 of the Registration Act. In our opinion the right to collect dues upon a given spot is such a benefit, and therefore we are constrained to find that the document in question purported to convey that which falls within the definition of immovable property. The so-called lease being an unregistered instrument, it could not effect the transfer and could not be admissible in evidence. We are therefore of

1905

SIKANDAR

v.

BAHADUR.

opinion that the Court of first instance was right. We set aside the order of the lower appellate Court and restore the decree of the Court of first instance with costs in all Courts.

[Of. *Baldeo Singh v. Beni Singh* (1) and *Rameshar Singh v. Durga Das* (2).—ED.]

*Appeal decreed.*

1905

January 24.

*Before Mr. Justice Blair and Mr. Justice Banerji.*

UDIT NARAIN SINGH (DEFENDANT) v. MURTAZA KHAN (PLAINTIFF)\*  
*Civil Procedure Code, sections 278, 283—Act No. XV of 1877, schedule II, article 12—Suit to establish right to property sold in execution—Limitation—Sale without decision as to rights of intervenor.*

When an intervenor claims a share of attached property the Court should define the respective shares of the debtor and the intervenor, and sell the debtor's definite share only. If the Court omits to do so, and sells the attached property subject to the intervenor's claim, this is no valid order under section 280, 281 or 282 of the Code of Civil Procedure, and the limitation of one year for a suit under section 283 of the Code does not apply. *Manohur Khan v. Troyluckhonath Ghose* (3) followed.

IN this case certain property, including a grove, was attached and advertised for sale by the decree-holder as the property of his judgment-debtor, Sheo Singh. The zamindar of the village, Chaudhri Jai Chand Singh, took an objection that the grove belonged to him, the zamindar, and not to the judgment-debtor. The Court, instead of deciding this objection, ~~in~~ <sup>on</sup> the property subject to the objection. The grove was purchased by Raja Udit Narain Singh, who obtained a sale certificate on the 22nd January 1869, without any condition entered in it, and some time afterwards obtained possession. In 1903 the representative in title of the zamindar sued to recover possession of this grove on the ground that the order for sale subject to the purchasers establishing the judgment-debtor's rights was an absolutely illegal order which he was entitled to treat as a nullity. The Court of first instance (Subordinate Judge of Farrukhabad) found that the suit was barred by limitation, and dismissed it. The plaintiff appealed.

\* First Appeal No. 78 of 1904, from an order of H. W. Lyle, Esq., District Judge of Farrukhabad, dated the 23rd of April 1904.

(1) Weekly Notes, 1899, p. 57. (2) Weekly Notes, 1901, p. 128.

(3) (1865, 4 W. R., 35.



The lower appellate Court (District Judge of Farrukhabad) reversed the Subordinate Judge's decision and remanded the case under section 562 of the Code of Civil Procedure. Against this order of remand the defendant appealed to the High Court.

Mr. A. E. Ryves and Babu Sital Prasad Ghose, for the appellant.

Maulvi Ghulam Muftaba and Maulvi Muhammad Ishaq, for the respondent.

BLAIR and BANERJI, JJ.—This appeal is governed by the ruling, with which we entirely agree, in *Monohur Khan v. Troyluckhonath Ghose* (1). In that case it was held that where intervenors claim a share of attached property, the Court should define the respective shares of the debtor and the intervenor, and sell the debtor's definite share only. If the Court omits to do so, and sells the undefined rights and interests, there is no decision under section 246 of Act VIII of 1859 and the one year's rule of limitation does not apply. In this case the Court, instead of finding that it was satisfied with the proof of possession either in the case of the intervenors or in the case of the judgment-debtor, had ordered the sale of the property alleged to be of the judgment-debtor subject to the claim of the intervenors. This case is manifestly on all fours with the case in which the ruling referred to above was passed. This is sufficient in our opinion for the disposal of this. It is dismissed with costs.

*Appeal dismissed.*

*Before Mr. Justice Banerji.*

SALIG RAM (DEFENDANT) v. KALI SHANKAR (PLAINTIFF).\*

*Pre-emption—Concurrent suits for pre-emption brought by co-sharers having equal rights—Decree.*

Where, pending a suit brought by one co-sharer for pre-emption another co-sharer having equal rights with the first filed a similar suit for pre-emption of the same sale, it was held that the second plaintiff was entitled

\*Second Appeal No. 699 of 1903, from a decree of Maulvi Aziz-ul-Rahman, Subordinate Judge of Mainpuri, dated the 11th of May 1903, reversing a decree of Babu Keshab Deb, Munsif of Phaphund, dated the 30th of January 1903.

1905

UDIT  
NARAIN  
SINGH  
v.

MURTAZA  
KHAN.

1905  
January 30.

1905

SALIG RAM

v.

KALI  
SHANKAR.

to a decree for pre-emption in respect of one-half of the property sold. *Jai Ram v. Mahabir Rai* (1) followed. *Man Khan v. Mamur Khan* (2) distinguished.

THE facts of this case are as follows:—

One Salig Ram filed a suit for pre-emption of certain property on the 8th of December 1902. On the 18th of December 1902 Kali Shankar also instituted a suit for pre-emption of the same property. He made Salig Ram a defendant to his suit and applied to be brought on to the record as a defendant in the suit filed by Salig Ram. On the same day, namely, the 18th December, Salig Ram entered into a compromise with the vendee, and on the basis of that compromise obtained a decree for pre-emption, although the suit was on that day up for settlement of issues only. The consequence was that Kali Shankar's suit was dismissed by the first Court (Munsif of Phaphund) on the finding that it had been filed after the passing of the decree in Salig Ram's suit. On appeal by the plaintiff, however, the Subordinate Judge of Mainpuri set aside the Munsif's decree and gave the plaintiff a decree for pre-emption in respect of one half of the property claimed, on the finding that Kali Shankar's suit had in fact been filed before the decree in Salig Ram's suit was passed and that both parties had equal rights as pre-emptors. The defendant appealed to the High Court.

*Lakshmi Narain*, for the appellant.

The Hon'ble Pandit *Sundar Lal* and Pandit *Baldeo Ram Dave*, for the respondent.

BANNERJI, J.—One Mutsaddi Lal, having got a decree for foreclosure, a suit for pre-emption was brought in respect of the property to which the decree related by the appellant Salig Ram. On the 18th of December 1902 the respondent Kali Shankar also brought a suit for pre-emption in respect of the same property. On that date the suit brought by Salig Ram was compromised by him and by the vendee, with the result that in accordance with the compromise a decree for pre-emption was made in favour of Salig Ram, although that date was the date fixed for settlement of issues only and not for final

disposal. If the suit brought by Kali Shankar on the 18th of December 1902 was filed after Salig Ram had got his decree, Kali Shankar's claim would manifestly be too late, because it has been found that both he and Salig Ram had equal rights of pre-emption. Salig Ram was added as a defendant to Kali Shankar's suit. He contended that he had already obtained his decree when Kali Shankar's suit, the one out of which the present appeal arises, was filed. The Court of first instance found in his favour and dismissed the suit. The lower appellate Court has come to a different conclusion upon that point. It was not satisfied that the suit of Salig Ram had been disposed of before the plaint in Kali Shankar's case was filed. On the contrary, it was of opinion that whilst the suit of Salig Ram was pending, Kali Shankar brought his suit. That being so, the suit of the plaintiff, Kali Shankar was not open to the objection that he had brought his suit after another co-sharer, who had equal rights with him, had already obtained a decree. The lower appellate Court has decreed one-half of the property to Kali Shankar on the ground that both he and Salig Ram have equal rights of pre-emption. This decree is in accordance with the rules of justice, equity and good conscience, which, in the absence of any statutory enactment, must be applied to a case like this. This was the rule which was followed in *Jai Ram v. Mahabir Rai* (1). The learned Judge for the appellant referred to the case of *Man Khan v. Mamur Khan* (2). That case has no bearing upon the question which arises in this case. That was a suit in which both the pre-emptor and the vendee were co-sharers and the pre-emptor had no better right than the vendee. It was rightly held that the plaintiff could not successfully maintain a claim for pre-emption under those circumstances. The Court below was right, and I dismiss this appeal with costs.

1905

SALIG RAM

v.

KALI  
SHANKAR.*Appeal dismissed.*

(1) (1885) I. L. R., 7 All., 720.

(2) Weekly Notes, 1886, p. 56.

## REVISIONAL CRIMINAL.

1905  
January 31.

Before Mr. Justice Aikman.  
EMPEROR v. JAGAN NATH.\*

*Revision—Criminal Procedure Code, section 439—Practice—Discretion  
of Court.*

Unexplained delay in applying for revision of an order passed to the prejudice of the applicant is a reason for the High Court, in the exercise of its discretion, declining to interfere.

IN this case one Pandit Jagan Nath, a resident of Agra, was summoned before the Cantonment Magistrate of Agra to answer for his omission to comply with a notice issued by the Cantonment Committee directing him to have a compound in his possession cleared of jungle and refuse. Jagan Nath appeared before the Cantonment Magistrate on the 2nd of May 1904, and, according to the Magistrate's record, pleaded guilty, and was fined Rs. 2. An application for revision of this order was preferred to the Sessions Judge, before whom an attempt was made to show that the Cantonment Magistrate erroneously recorded a plea of guilty. This application was rejected on the 3rd of June 1904. On the 26th of November 1904 a further application for revision was presented to the High Court supported by another affidavit to the effect that the applicant did not plead guilty before the Cantonment Magistrate on the 2nd of May 1904.

The Hon'ble Pandit *Sundar Lal*, the Hon'ble Pandit *Madan Mohan Malaviya* and Dr. *Tej Bahadur Sapru*, for the applicant.

The Assistant Government Advocate (Mr. W. K. Porter), for the Crown.

AIKMAN, J.—This is an application for the revision of an order of the Cantonment Magistrate of Agra, dated the 2nd May 1904, fining the applicant Rs. 2 under section 85 of the Cantonment Code. The applicant applied to the Sessions Judge in revision. The application was rejected on the 3rd June 1904. The present application was not put in until the 26th November 1904. No explanation is given of this long delay. Looking to the nature of the allegations in the applicant's affidavit I am

\* Criminal Revision No. 797 of 1904.

of opinion that having regard to this delay I ought not to interfere. The Cantonment Magistrate who recorded a plea of guilty, although the applicant asserts that he pleaded not guilty, is now dead; and I decline to act on a one-sided statement of the accused that the Magistrate's record is wrong.

I reject the application.\*

1905

EMPEROR

v.

JAGAN

NATH,

*Before Mr. Justice Aikman.*

EMPEROR v. JAGARDEO PANDE.†

1905

January 31.

*Act No. I of 1872 (Indian Evidence Act), section 155—Impeachment of credit of witness—Proof of previous statement of witness to the Police—Criminal Procedure Code, section 162.*

*Held* that for the purpose of impeaching the credit of a witness who gives evidence in favour of an accused person it is not illegal to examine the Police Officer who investigated the case with the object of showing that the witness made a different and inconsistent statement before him. *Queen-Empress v. Sitaram Vithal* (1) and *Queen-Empress v. Madho* (2) followed.

JAGARDEO PANDE and three others were convicted by a Magistrate of causing grievous hurt to one Bhola, and Jagardeo was sentenced to one year's rigorous imprisonment, and was also bound over under section 106 of the Code of Criminal Procedure to keep the peace. On appeal to the Sessions Judge the conviction and sentence were confirmed. Jagardeo applied in revision to the High Court, where it was contended that the conviction and sentence ought to be set aside as being based in a large measure upon evidence which was not legally admissible. This contention was founded upon the following facts. Three of the witnesses for the Crown—Mahabir, Debi Dayal and Sukh Ram—whilst giving evidence against the remaining accused, not only did not implicate Jagardeo, but stated that he was not present at the time of the attack. Upon this the Sub-Inspector—Sheo Dayal Singh—who had investigated the

\* See also the observations of the Court in *Balwant Singh v. Umed Singh* (I. L. R., 18 All. 203), and Criminal Revision No. 820 of 1904, decided on the 31st of January 1905, in which the following order was passed:—

AIKMAN, J.—Looking to the long delay—upwards of a year—which took place in moving this Court, a delay which is not explained to my satisfaction, I decline to interfere in revision. The application is rejected.

† Criminal Revision No. 749 of 1904.

(1) (1887) I. L. R., 11 Bom., 657.

(2) (1892) I. L. R., 15 All., 25.

1905

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EMPEROR  
v.  
JAGARDEO  
PANDE.

case was called as a witness to prove that these prosecution witnesses had made totally different statements when examined by him in the course of the investigation. It was argued that the Magistrate had used the evidence of the Sub-Inspector not solely for the purpose of discrediting the three witnesses above referred to, but as substantive evidence corroborating that given by the complainant, and therein had acted illegally, and that his conclusions in the trial were thereby vitiated.

Mr. C. C. Dillon, for the applicant.

The Assistant Government Advocate Mr. (W. K. Porter), for the Crown.

AIKMAN, J.—The applicant Jagardeo Pande has been convicted under section 325 of the Indian Penal Code and sentenced to one year's rigorous imprisonment. He has also been bound over under the provisions of section 106 of the Code of Criminal Procedure to keep the peace. The conviction and sentence were affirmed by the learned Sessions judge. In revision it is contended that the Courts below were wrong in taking into consideration and treating as evidence in the case the deposition of a Police Sub-Inspector in regard to what certain witnesses for the prosecution had stated in the course of the inquiry. It is clearly proved that the complainant, Bhola, was severely beaten on the morning of the 24th of May last. The serious nature of the injuries which he received appears from the evidence given by the Assistant Civil Surgeon. Four persons were sent up by the Police charged with having caused grievous hurt to Bhola. Three witnesses, *i.e.*, Mahabir, Debi Dayal and Sukh Ram were sent up as witnesses for the Crown. These three witnesses, whilst implicating three of the accused before the Court, not only did not implicate the fourth accused *i.e.*, Jagardeo Pande, but stated distinctly that he was not present at the time of the attack. They were questioned with regard to statements they were alleged to have made to the Police, and they denied that they had named Jagardeo Pande to the Police. Thereupon Sheo Dayal Singh, the Sub-Inspector of Police who held the inquiry, was called as a witness in order to prove that the three witnesses just named had before him made statements inconsistent with the evidence which they



1905

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EMPEROR  
v.  
JAGARDEO  
PANDE.

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gave in Court in favour of the accused Jagardeo Pande. It has been ably argued by the learned counsel who appears in support of the application that the course adopted by the learned Magistrate was illegal, and that his admission of and reference in his judgment to the evidence given by the Sub-Inspector vitiates the conclusion at which he arrived in regard to the applicant's participation in the crime. The learned Assistant Government Advocate who appears in support of the conviction has laid before me numerous authorities bearing on this question. The point for decision is a difficult one, but having reference to what was said in *Queen-Empress v. Sita Ram Vithal* (1) and in *Queen-Empress v. Madho* (2), where the Bombay case was cited with approval, I am not prepared to say that it is illegal to examine a Police Officer for the purpose of impeaching the credit of a witness who gives evidence in favour of an accused. Had, however, it been shown to me that the Magistrate treated the evidence of the Police Officer in regard to previous statements made to him as the basis of his conclusion in regard to the applicant's guilt I could not have supported the conviction. But although there are some expressions in his judgment which might give countenance to a contrary view, what is said towards the end of the judgment shows that the conviction was not based on evidence not legally admissible. At page 38 of his judgment the Magistrate deals with the contention ~~that~~ at the applicant could not be convicted solely on the evidence of the complainant, Bhola. He meets this argument by reference to section 134 of the Evidence Act, and goes on to say:—"Having carefully considered all the *pros* and *cons* of the case, the Court sees absolutely no reason to disbelieve Bhola's evidence." He then gives a valid reason for attaching credit to this evidence, and does not refer at all to the evidence of the Sub-Inspector as corroborating it. After full consideration I see no reason for disturbing the conviction. With regard to the sentence I note that the applicant did not himself strike the complainant. Had it been shown, however, that it was he who planned the attack against the complainant and got the other accused to carry out his design, I should not

(1) (1887) I. L. R., 11 Bom., 657.

(2) (1892) I. L. R., 15 All., 25.

1905

EMPEROR  
v.  
JAGARDEO  
PANDE.

have interfered. But the complainant does not allege any enmity against the applicant. His evidence goes to show that the prime mover in the attack was one Chet Nath, and that the other accused were present as friends of Chet Nath. This being so, and taking into account the fact that the applicant merely encouraged by his words the other accused, I am of opinion that he did not deserve so severe a sentence as the persons who inflicted the grievous injuries on the complainant. I therefore reduce the sentence passed on him to one of six months' rigorous imprisonment. In other respects the application is rejected.

## APPELLATE CIVIL.

1905  
January 31.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice  
Sir William Burkitt.*

RAM SUBHAG AND ANOTHER (PLAINTIFFS) v. NAR SINGH AND OTHERS  
(DEFENDANTS).\*

*Act No. IV of 1882 (Transfer of Property Act), section 91 (b)—Redemption  
of mortgage—Right of sub-mortgagee to redeem a prior mortgage.*

In 1884 G. and others, the owners of the mortgaged property, executed a usufructuary mortgage in favour of R. D. and others to secure a principal sum of Rs. 349. In the mortgage it was provided that the property might be redeemed in *Chait* of any year. In April 1900 the same mortgagors executed a further mortgage of the same property in favour of one B. L. to secure a principal sum of Rs. 899. This mortgage contained a provision that the mortgagee should get possession of the property after redeeming the earlier mortgage of 1884. In the following month B. L. sub-mortgaged the property in favour of R. S. and M. R. to secure a principal sum of Rs. 599. Of this sum Rs. 349-15 were left in the hands of the mortgagees to enable them to redeem the mortgage of 1884 and obtain possession of the mortgaged property; and in the deed the sub-mortgagor in express terms transferred his interest in the land, the subject-matter of the mortgage, and agreed that the sub-mortgagees should remain in possession of the land from 1308 to 1314 Fasli, paying rent therefor to the proprietors of the mahal. *Held* that the sub-mortgagees from B. L. were entitled to redeem the prior mortgage of 1884. *Ganga Prasad v. Chunni Lal* (1) distinguished. *Misri Lal v. Abdul Aziz Khan* (2) overruled. *Muthu Vijia Raghunatha Ramachandra Vacha Mahali Thurai v. Venkatachallam Chetti* (3) and *Mata Din Kasodhan v. Kazim Husain* (4) referred to.

\* Appeal No. 21 of 1904 under section 10 of the Letters Patent.

(1) (1895) I. L. R., 18 All., 113.

(3) (1896) I. L. R., 20 Mad., 35.

(2) Weekly Notes, 1901, p. 158.

(4) (1891) I. L. R., 13 All., 432.

THE facts of this case are as follows :—

IN 1884 three persons, Ganga, Sheo Shankar and Sheo Nandan, executed a usufructuary mortgage of certain property owned by them in favour of Ram Debi and others to secure a principal sum of Rs. 349. It was provided in this mortgage that the mortgagors could redeem in the month of *Chait* of any year. In April 1900 the same mortgagors executed a further mortgage of the same property in favour of one Baleshar Lal to secure a principal sum of Rs. 899. This mortgage contained a provision that Baleshar Lal should get possession of the mortgaged property after redeeming the earlier mortgage of 1884. In the following month Baleshar Lal sub-mortgaged the property in favour of Ram Subhag and another to secure a principal sum of Rs. 599. Of this sum Rs. 349-15 were left in the hands of the mortgagees to enable them to redeem the mortgage of 1884 and obtain possession of the property. The sub-mortgage contained a provision that possession when obtained should be retained up to the year 1314 Fasli. The sub-mortgagor also in express terms transferred his interest in the land the subject of the mortgage, and agreed that the sub-mortgagees should remain in possession of the land from 1308 to 1314 Fasli, paying rent therefor to the proprietor of the mahal. The material clause of the deed in this connection was as follows :—"The land which has been mortgaged to me, I, having made a sub-mortgage of that land, promise that you shall remain in possession of the land so mortgaged from 1308 to 1314 Fasli." The sub-mortgagees entered into negotiations for redemption of the prior mortgage in pursuance of the arrangement entered into between them and the sub-mortgagor, but the prior mortgagees refused to accept payment of the mortgage money. The sub-mortgagees accordingly brought the present suit for redemption of the mortgage of 1884.

The Court of first instance decreed the plaintiffs' claim for redemption. The defendants appealed, but the lower appellate Court upheld the first Court's decree and dismissed the appeal. The defendants appealed to the High Court, where, their appeal coming before a single Judge of the Court, it was held that the sub-mortgagees had no right of redemption at all. The

1905

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RAM  
SUBHAG  
v.  
NAR SINGH.

1905

RAM  
SUBHAG  
v.  
NAR SINGH.

decrees of the two lower Courts were therefore set aside and the plaintiffs' suit dismissed. From this decision the plaintiffs preferred the present appeal under section 10 of the Letters Patent.

Mr. *Mohan Lal Agarwala*, and *Munshi Haribans Sahai*, for the appellants.

Mr. *J. Simeon* and *Maulvi Muhammad Ishaq*, for the respondents.

STANLEY, C.J.—This is an appeal under section 10 of the Letters Patent against a decision of a learned Judge of this Court reversing the decrees of the lower Courts in a suit for redemption by sub-mortgagees of a prior mortgage. In 1884 the owners of the mortgaged property, namely, Ganga, Sheo Shankar and Sheonandan, executed a usufructuary mortgage in favour of Ram Debi and others to secure a principal sum of Rs. 349. In the mortgage it was provided that the property might be redeemed in *Chait* of any year. In the month of April 1900 the same mortgagors executed a further mortgage of the same property in favour of one Baleshar Lal to secure a principal sum of Rs. 899. This mortgage contained a provision that Baleshar should get possession of the mortgaged property after redeeming the earlier mortgage of 1884. In the following month Baleshar Lal sub-mortgaged the property in favour of the plaintiffs to secure a principal sum of Rs. 599. Of this sum Rs. 349-15-0 were left in the hands of the mortgagees to enable them to redeem the mortgage of 1884 and obtain possession of the mortgaged property. The sub-mortgage contained a provision that possession when obtained should be retained up to the year 1314 Fasli. In it also the sub-mortgagor in express terms transferred his interest in the land, the subject-matter of the mortgage, and agreed that the sub-mortgagees should remain in possession of the land from 1308 to 1314 Fasli, paying rent therefor to the proprietor of the mahal. The language of the deed is as follows:—"The land which has been mortgaged to me, I, having made a sub-mortgage of that land, promise that you shall remain in possession of the land so mortgaged from 1308 to 1314 Fasli," *et cetera*. The plaintiffs entered into negotiation for redemption of the prior mortgage in pursuance

of the arrangement entered into between them and their sub-mortgagor, but the defendants refused to accept the money payable under that mortgage and deliver up possession. Hence the suit out of which this appeal has arisen.

The Court of first instance decreed the plaintiffs' claim for redemption, and the decree for redemption was upheld on appeal, but in second appeal the learned Judge of this Court before whom the appeal came was of opinion that the sub-mortgagees had no right of redemption whatever, and, reversing the decrees of the two lower Courts, dismissed the plaintiffs' claim. In arriving at his decision the learned Judge relied upon the decisions of this Court in the case of *Ganga Prasad v. Chunni Lal* (1) and *Misri Lal v. Abdul Aziz Khan* (2), as determining the question before him. He observes in the course of his judgment:—"It is quite clear from what is laid down in those cases that a sub-mortgagee does not stand in the shoes of his mortgagor. As was said in the former of those decisions, the sole right of the sub-mortgagee is to get a decree for money against his mortgagor under which decree he might possibly attach, if not paid off, his mortgagor's mortgage." He then says:—"The question whether a sub-mortgagee can redeem must be decided with reference to the terms of section 91 of the Transfer of Property Act. The learned vakil who appears for the respondents admits that the only clause in that section upon which he can rely is clause (b), which confers a right to sue for redemption upon 'any person having any interest in or charge upon the right to redeem the property.' In the second of the two cases cited above the learned Judge Champier says:—"It seems to follow from the decision in that case, *i.e.*, *Ganga Prasad v. Chunni Lal* (1) that a sub-mortgagee acquires no interest in or charge upon the property.' It was held by a majority of the Full Bench in *Mata Din Kasodhan v. Kazim Husain* (3) that the term 'property' as used in Chapter IV of Act IV of 1882 (in which Chapter section 91 occurs) means an actual physical object, and does not include mere rights relating to physical objects. I am bound to accept this definition of the

1905

RAM  
SUBHAGv.  
NAR SINGH.

Stanley, C. J.

(1) (1895) I. L. R., 18 All., 113. (2) Weekly Notes, 1901, p. 153.  
(3) (1891) I. L. R., 13 All., 432.

1905

RAM  
SUBHAG  
v.  
NAB SINGH.  
*Stanley, C. J.*

word property. Having regard to this definition I am of opinion that the plaintiffs' case cannot be brought under section 91(b). Had the plaintiffs' mortgagee assigned his mortgage to the plaintiffs, or had the plaintiffs by proceedings in execution acquired the full rights of their mortgagor, they might have maintained the suit; but, as it is, I do not think that such rights as they gained by the sub-mortgage from Baleshar Lal gave them any right to sue to redeem the prior mortgage." I am wholly unable to agree with the learned Judge in this. It seems to me that section 91 of the Transfer of Property Act in the clearest terms gives a right to redeem to a sub-mortgagee. Even assuming that the sub-mortgage in this case did not give any interest in or charge upon the mortgaged property to the sub-mortgagees, which I am not prepared to admit, it undoubtedly gave them an interest in or charge upon the right to redeem the mortgaged property. Sub-section (b) provides that "any person having any interest in or charge upon the right to redeem the property" may redeem. The two cases upon which the learned Judge bases his conclusion were not concerned with redemption proceedings. In the case of *Ganga Prasad v. Chunni Lal* (1) the question before the Court was whether or not a person in whose favour what purported to be a sub-mortgage, but in which there had been no assignment of the mortgage, had been executed, could maintain a suit for sale of the mortgaged property. In that case Edge, C.J., and my brother Burkitt held that the plaintiff could not maintain a suit for sale, observing that "it is inconceivable to see how any Subordinate Judge could have given the plaintiff a decree for sale under section 88 of Act No. IV of 1882 of property which was not mortgaged to him. The sole right of Chunni Lal was to get a decree for money against Nand Kishore (*i. e.*, the sub-mortgagor), and then under that decree he might possibly have attached, if it had not been paid off, the mortgage held by Nand Kishore." Now in the first place I may point out that in that case the sub-mortgagor purported to mortgage his rights as mortgagee, but did not assign his mortgage to the sub-mortgagee. In the case under appeal the sub-mortgagor expressly

(1) (1895) I. L. R., 18 All., 113.



sub-mortgaged the land which was comprised in his mortgage. I desire to refrain from expressing any opinion upon the question whether or not a sub-mortgagee can or cannot properly institute a suit for sale of the mortgaged property. The view expressed by the learned Judges of this High Court in the case to which I have referred did not commend itself to the Bench of the Madras High Court who decided the case of *Muthu Vijai Raghunatha Ramachandra Vacha Mahali Thurai v. Venkatachallam Chetti* (1). In that case it was held by Subramania Ayyar and Davies, JJ., that a sub-mortgagee is entitled to a decree for sale of the original mortgagor's interest in cases and in circumstances which would have entitled the original mortgagee on the date of the sub-mortgage to claim such relief. There is a good deal in the judgment of Subramania Ayyar, J., in support of his view which commends itself to me. The learned Judges in their judgment in *Ganga Prasad v. Chunni Lal* says that "the sole right of Chunni Lal (*i.e.*, the mortgagee) was to get a decree for money against Nand Kishore (*i.e.*, the sub-mortgagor) and then under that decree he might possibly have attached, if it had not been paid off, the mortgage held by Nand Kishore." This passage is relied upon on behalf of the respondents as an authority for the proposition that a sub-mortgagee has no interest or charge upon the mortgaged property which would entitle him to redeem: that his sole and only remedy is to get a money decree against his sub-mortgagor. Indeed in the later case of *Misri Lal v. Abdul Aziz Khan* (2) Chamier, J., seems to think that this necessarily followed from the decision in *Ganga Prasad v. Chunni Lal*. He says in the course of his judgment:—"In *Ganga Prasad v. Chunni Lal* it was held by two Judges of this Court that the sole right of the sub-mortgagee as against the original mortgagee is to obtain a money decree against him. That decision was dissented from by the Madras High Court, but it is binding upon me. It seems to me to follow from the decision in that case that a sub-mortgagee acquires no interest in or charge upon the property. If otherwise, he would surely be entitled to a decree for sale of the property mortgaged to him." Assuming that the case of *Ganga*

1905

RAM  
SUBHAG  
v.  
NAB SINGH.  
Stanley, C. J.

(1) (1896) I. L. R., 20 Mad., 35. (2) Weekly Notes, 1901, p. 153.

1905

RAM  
SUBHAG  
v.  
NAB SINGH.

Stanley, C. J.

*Prasad v. Chummi Lal* was rightly decided, it seems to me with all deference that Chamier, J., goes too far in supposing that it follows from that decision that a sub-mortgagee acquires no interest in or charge upon the mortgaged property. The learned Judges did not so decide, and they certainly do not appear to have had before their minds the provisions of section 91 of the Transfer of Property Act. That section, as I have said, confers a right of redemption upon any person having any interest in or charge upon the right to redeem the property. The learned Judge of this Court from whose decision the present appeal has been preferred refers to the case of *Mata Din Kasodhan v. Kazim Husain* (1), in which it was held that the term "property" as used in the Transfer of Property Act means an actual physical object, and does not include mere rights relating to physical objects, and, accepting this definition, held that the plaintiffs were not entitled to redeem. He seems to me not to have attached due weight to the language of sub-section (b) of section 91, which gives the right of redemption to a person who has an interest in or charge upon the right to redeem. The section is not confined to persons who have an interest in the property, that is the actual physical object, but extends also to persons having an interest in the right to redeem the property. Now Baleshar Lal, the sub-mortgagee, who was a puisne mortgagee, having an interest in or charge upon the property, had undoubtedly a right to redeem the mortgage of 1884. He, by the sub-mortgage of May 1900, sub-mortgaged the land which had been so mortgaged to him, and thereby undoubtedly, as it seems to me, if he did not confer upon the sub-mortgagees an interest in or charge upon the property, at least created an interest in or charge upon the right to redeem, to which Baleshar Lal was entitled. I am therefore unable to agree in the view of the learned Judge of this Court. A sum of Rs. 349-15 was actually left by Baleshar Lal in the hands of his mortgagees for the redemption of the mortgage of 1884. This shows the intention of the parties that the earlier mortgage should be redeemed by the sub-mortgagees. The effect of the decision from which this appeal has

been preferred is to preclude the plaintiffs from carrying out their obligation and relieving the property from the burden of the earlier mortgage. I would allow this appeal with costs, and, setting aside the decree of the single Judge of this Court, restore the decree of the lower appellate Court.

1905  
 RAM  
 SUBHAG  
 v.  
 NAB SINGH.

BURKITT, J.—I might have contented myself with saying that I concur in the order proposed by the learned Chief Justice. But being one of the Judges responsible for the decision in *Ganga Prasad v. Chunni Lal* (1) I think it right to add a few words. It seems to me that in the judgment now under appeal the learned Judge of this Court lost sight of the fact that while the appeal before him was one in a suit for a redemption of a mortgage, the suit in *Ganga Prasad v. Chunni Lal* was one for sale. In the former the sub-mortgagor had by an express covenant with his sub-mortgagee conveyed to the latter an interest in the right to redeem the mortgage of 1884 and had left part of the mortgage money in the sub-mortgagee's hands for that purpose, while in the latter the sub-mortgage was only a mortgage of the mortgagee rights of the sub-mortgagor. It follows therefore in my opinion that the sub-mortgagee in the case now under appeal before us had acquired by express covenant with his sub-mortgagor an interest in the right to redeem the mortgage of 1884 under the terms of clause (b) of section 91 of the Transfer of Property Act, while in *Ganga Prasad v. Chunni Lal* the relief asked for was sale of the mortgagor's property to which section 91 of the Transfer of Property Act is not applicable.

Further I would add that both in this case and in *Misri Lal v. Abdul Aziz Khan* (2), the learned Judges have, I think, attached too wide a meaning to the words "the sole right" used towards the conclusion of the judgment in *Ganga Prasad v. Chunni Lal* (3). Those words must be read in connection with the nature of the suit in the judgment in which they were used. The only relief asked for in that case was an order for sale of mortgaged property on suit by a sub-mortgagee for sale of property not mortgaged to him, or, to use the words of the

(1) (1895) I. L. R., 18 All., 113.

(2) Weekly Notes, 1901, p. 153.

(3) (1895) I. L. R., 18 All., 113.

1905

RAM  
SUBHAG  
v.  
NAR SINGH.

judgment, the sub-mortgagee sought to "get the debt due from Nand Kishore to him paid by sale of the property of Rupa and others who were not his mortgagors." The only question before Edge, C.J., and myself in that case was whether such a relief could be allowed. We had not to consider, and did not consider, whether a suit for redemption, which is the relief asked for in the present suit, could be entertained, nor was it necessary for us to discuss that question; we certainly did not intend by the use of the words "the sole right" to express any opinion thereon.

For the above reasons I concur in the order proposed by the learned Chief Justice, allowing the appeal, setting aside the decree of the learned Judge of this Court, and restoring the decree of the lower appellate Court.

BY THE COURT.—The order of the Court is that the appeal be allowed, the decree of the learned Judge of this Court be set aside, and the decree of the lower appellate Court be restored with costs in all Courts.

*Appeal decreed.*

1905

February 1.

## REVISIONAL CRIMINAL.

*Before Mr. Justice Aikman.*

EMPEROR v. TARA SINGH AND OTHERS.\*

*Act (Local) No. II of 1901 (Agra Tenancy Act), section 134—Distraint—Sale adjourned owing to absence of bidders—Obstruction to sale on adjourned date—Act No. XLV of 1860, section 184.*

The law as laid down in Chapter IX of the Agra Tenancy Act, 1901, does not authorize the adjournment of a sale of distrained property owing to the absence of bidders. Hence where for this reason an amin adjourned a sale and fixed a fresh date, and obstruction was offered to the sale so adjourned, it was held that the persons so obstructing the sale could not be convicted under section 184 of the Indian Penal Code.

In this case an amin was deputed to sell certain property which had been distrained under the provisions of the Agra Tenancy Act, 1901, for arrears of rent. The sale was fixed for the 22nd of April 1904; but on that date no one came forward to bid for the property, and in consequence the sale

\* Criminal Revision No. 889 of 1904.

was postponed until the 5th of May. On the 5th May it was found that the proclamation fixing the sale for that date was returned unserved, and accordingly the amin adjourned the sale until the 7th of May. On that date Tara Singh and others made their appearance armed with lathis and threatened to assault the amin if he persisted in holding the sale, and the amin was ultimately obliged to return to headquarters without selling the property distrained. Tara Singh and others were tried by a Magistrate of the 2nd class for an offence under section 184 of the Indian Penal Code and were convicted and sentenced each to one month's rigorous imprisonment. They appealed to the District Magistrate, who upheld the convictions and the sentence upon Tara Singh, but reduced the sentences of the others to fines of Rs. 25 each. The convicts then applied in revision to the High Court, urging, as they had done before the District Magistrate in appeal, that the amin had no authority to adjourn the sale; that consequently the sale held on the 7th of May was not a sale held "by the lawful authority of any public servant," and therefore the convictions under section 184 of the Indian Penal Code were not legal.

Mr. C. R. Alston, for the applicants.

The Assistant Government Advocate Mr. (W. K. Porter), for the Crown.

AIKMAN, J.—The applicants, Dip Singh, Moti, Badam, Pem Singh, Kundana and Jhanda were convicted by a Magistrate of the 2nd class of obstructing a sale of property offered for sale by the lawful authority of a public servant, and were sentenced to one month's rigorous imprisonment each under the provisions of section 184 of the Indian Penal Code. At the same trial the applicant, Tara Singh, was convicted of abetting the offence under section 184 of the Indian Penal Code and was also sentenced to one month's rigorous imprisonment under section 184 read with section 109 of the Indian Penal Code. On appeal the learned District Magistrate confirmed the conviction and sentence passed upon Tara Singh. He also confirmed the convictions of the other accused, but set aside the sentences of imprisonment passed upon them, and in lieu thereof ordered each accused to pay a fine of Rs. 25. This

1905

EMPEROR

v.  
TARA  
SINGH.

1904

EMPEROR

v.

TARA  
SINGH.

Court is moved to set aside the convictions on the ground that the sale which is said to have been obstructed was not a sale by the lawful authority of a public servant. The learned District Magistrate was of opinion that the question whether the particular sale which the accused are said to have obstructed was a sale held by lawful authority was "a matter of academic interest." This is a view which I cannot accept. To justify a conviction under section 184 of the Indian Penal Code the lawful authority of the public servant offering the property for sale must be proved by the prosecution. The accused are said to have obstructed a sale of property by an amin on the 7th of May last. I think it is clear from the proceedings that the amin had no authority whatever to hold any sale on that day. The sale which it was attempted to hold was one under the provisions of Chapter IX of the Agra Tenancy Act, 1901. It appears that the sale was originally fixed for the 22nd of April. On that date the amin postponed the sale until the 5th of May. The reason given for the postponement was that there were no bidders. Now the law under which the sale was being held makes no provision for the postponement of a sale on any such ground. The conditions regarding postponement are to be found in section 134 of the Act. This is the only section which provides for a postponement. The conditions laid down in that section did not exist in the present case, inasmuch as there was no application by the defaulter to have the sale adjourned. Moreover, that section provides for an adjournment until the next day or until the next market day. The amin had no authority to fix any date that seemed good to him. The law does not authorize the adjournment of a sale owing to the absence of bidders. As is contended by the learned counsel for the applicants, it is for the distrainer to see that bidders are present. If no bidders are present, it seems to me that the distraint falls through. A constituent part of the offence as defined in section 184 of the Indian Penal Code is wanting in this case. I therefore quash the convictions of the applicants. The fines, if paid, must be refunded. Tara Singh has been released on bail under the order of this Court, dated the 20th December last. He need not surrender and his bail bond is discharged.



Before Mr. Justice Aikman.

NUR MUHAMMAD (APPLICANT) v. AYESHA BIBI (OPPOSITE PARTY).\*

*Criminal Procedure Code, section 488—Maintenance—Effect of Civil Court decree in a suit for restitution of conjugal rights upon an order for maintenance passed by a Magistrate.*

A husband, against whom an order had been passed by a Magistrate under section 488 of the Code of Civil Procedure, directing him to pay a monthly allowance of Rs. 4-8 for the maintenance of his wife, brought a suit against his wife for restitution of conjugal rights. That suit was compromised, and a consent decree passed whereby the petitioner was to pay the respondent Rs. 4-4 per mensem and to provide a house for her to live in near his own. Held that this decree of the Civil Court superseded the order of the Magistrate passed under section 488 of the Code of Civil Procedure. *In re Bulakidas* (1) followed.

THE facts of this case are as follows :—

On the 14th June of 1904 an order under section 488 of the Code of Criminal Procedure was made against the appellant Nur Muhammad for payment of Rs. 4-8 per mensem to his wife Musammat Ayesha Bibi. Subsequently Nur Muhammad brought a suit in the Civil Court against his wife for restitution of conjugal rights. This suit terminated in a consent decree whereby the petitioner was to pay to the respondent Rs. 4-4 a month for her maintenance and spend the other 4 annas on the rent of a house near his own, the house to be selected by him, and the wife was to come and live in it. The wife, however, objected to the house selected by the husband for her residence and refused to live in it. The husband then applied to the Magistrate to cancel the order passed by him under section 488 of the Code of Criminal Procedure, and upon this application being refused applied in revision to the Sessions Judge. The Sessions Judge being of opinion that the case was governed by the decision of the Bombay High Court in *In re Bulakidas* (1), reported it to the High Court for orders under section 488 of the Code of Criminal Procedure. In the explanation submitted by the Magistrate concerned the Magistrate distinguished the ruling of the Bombay High Court (which had not been cited to him at the hearing of Nur Muhammad's application) on the ground that there the Civil Court had passed

1905  
February 1.

\* Criminal Reference No. 771 of 1904.

(1) (1898) I. L. R., 23 Bom., 484.

1905

NUR  
MUHAMMAD  
v.  
AYESHA  
BIBI.

a decree for restitution of conjugal rights, whereas in the present case the petitioner had purposely refrained from getting such a decree :—" In the Bombay case the husband sued for and obtained a decree for restitution of conjugal rights. In the present case he appears to have made no honest attempt to win his suit. He practically agreed to his wife's living separately from him, while arrogating to himself the right of supervising her, and, parenthetically, making her life a burden to her. Moreover the Bombay High Court reversed the order of the Magistrate on the ground that an order of a Civil Court for restitution of conjugal rights determines an order for maintenance. In the present case Nur Muhammad wilfully omitted to attempt to get such a decree."

Maulvi *Muhammad Ishaq* (for whom Mr. *Karamat Hussain*), for the applicant.

Mr. *H. T. Coleman* (for whom Mr. *E. A. Howard*), for the opposite party.

AIKMAN, J.—On the 14th of June last the Joint Magistrate of Cawnpore made an order under section 488 of the Code of Criminal Procedure directing the applicant, Nur Muhammad, to make a monthly allowance of Rs. 4-8 for the support of his wife, Musammât Ayesha. Subsequently a decree was passed by the Civil Court in a suit brought by the husband for restitution of conjugal rights, whereby the husband was to pay his wife a monthly allowance of Rs. 4-4 and allot her a house near his own for her residence. This decree was passed by consent of parties. Thereafter the husband applied to the Magistrate to cancel his order of the 14th of June 1904. The Magistrate rejected the application. The learned Sessions Judge has submitted the case for the orders of this Court in revision, and calls attention to the ruling in *In re Bulakidas* (1), wherein it is laid down that a decree of a Civil Court for restitution of conjugal rights supersedes a maintenance order passed by a Magistrate, if the wife persists in refusing to live with her husband. The facts of that case are not exactly on all fours with those of the present, but in my opinion the principle laid down in it applies. The additional evidence taken

by the Magistrate shows that the wife objects to the house which her husband has selected for her residence. If that house does not answer the condition entered in the decree passed by consent of parties, the wife should, in my opinion, prefer an objection to the Civil Court. I hold that under the circumstances stated above the order of the 14th of June 1904 was superseded by the arrangement come to between the parties in the Civil Court, and that the order of the 14th June 1904 ought to have been cancelled. I therefore cancel that order.

1905

NUR  
MUHAMMAD  
v.  
AYESHA  
BIBI.

## APPELLATE CIVIL.

1905

February 8.

*Before Mr. Justice Blair and Mr. Justice Banerji.*

HARNAM CHANDAR (DECREE-HOLDER) v. MUHAMMAD YAR KHAN  
AND OTHERS (JUDGMENT-DEBTORS).\*

*Civil Procedure Code, section 244—Alteration of decree after execution—*

*Application for refund of money realized in execution—Limitation—Act No. XV of 1877 (Indian Limitation Act), Schedule, II, Article 178.*

A decree for sale under section 88 of the Transfer of Property Act, 1882, as drawn up, allowed a very high rate of interest to the decree-holder, and the amount due under this decree as it stood was realized by sale of the mortgaged property. Subsequently, on the judgment-debtors' application, the decree was amended so as greatly to reduce the rate of interest, and thereby a refund became due to the judgment-debtors.

*Held* that the judgment-debtors' application for a refund was not an application in execution but an application under section 244 of the Code of Civil Procedure, and that the limitation applicable was that prescribed by article 178 of the second schedule to the Indian Limitation Act, 1877, and began to run from the date of the amendment of the decree. *Daya Kishan v. Nanhi Begam* (1) distinguished.

THE circumstances which gave rise to this appeal were as follows:—On the 30th of June 1890, one Harnam Chandar obtained a decree for sale under section 88 of the Transfer of Property Act, 1882, against Muhammad Yar Khan and others. The defendants appealed against that decree, but their appeal was dismissed by the High Court on the 10th of April 1893. Subsequently an order absolute for sale was made. The mortgaged property was sold by auction, and the amount of the

\* First Appeal No. 134 of 1904, from an order of Babu Mad o Das, Sub-ordinate Judge of Saharanpur, dated the 28th of April 1904.

(1) (1898) I. L. R., 20 All., 304.

1905

HARNAM  
CHANDARv.  
MUHAMMAD  
YAR KHAN.

decree as it then stood was realized by the decree-holder. The judgment of the Court of first instance had awarded interest on the decretal amount at the rate of 6 per cent. per annum, but in the decree interest was allowed at the rate of 74 per cent. per annum, which was the contractual rate of interest. On the 27th of February, 1901, the judgment-debtors applied to the High Court under section 206 of the Code of Civil Procedure to amend the decree and bring it into accordance with the judgment; and this application was granted on the 19th of April 1901, the rate of interest on the amount decreed being reduced to 6 per cent. per annum. On the 18th of August, 1903, the judgment-debtors applied to the Court of the Subordinate Judge for a refund of the amount which had been realized from them in excess of what was payable under the decree as amended. The Subordinate Judge allowed the application. The decree-holder accordingly appealed to the High Court.

Dr. *Satish Chandra Banerji*, for the appellant.

Mr. *Abdul Raoof*, for the respondents.

BLAIR and BANERJI, JJ.—This appeal has arisen under the following circumstances:—On the 30th of June 1890 the appellant obtained a decree for sale under the provisions of section 88 of the Transfer of Property Act. An appeal was preferred to this Court from that decree and was dismissed on the 10th of April 1893. Subsequently an order absolute for sale was made. The mortgaged property was sold by auction, and the amount of the decree as it then stood was realized by the decree-holder. On the 27th of February 1901 the judgment-debtors applied to this Court under section 206 of the Code of Civil Procedure for amendment of the decree and to bring it into accord with the judgment. The judgment of the Court of the first instance, it appears, had directed interest on the decretal amount to be charged at the rate of 6 per cent. per annum, but in the decree as drawn up interest was allowed at the rate of 74 per cent. per annum, which was the contractual rate of interest. On the 19th of April 1901 this Court allowed the application for amendment of the decree, and the decree was accordingly amended, the rate of interest payable under it being reduced to 6 per cent. per annum. Thereupon,

1905

HARNAM  
CHANDARv  
MUHAMMAD  
YAB KHAN.

on the 18th of August 1903, the judgment-debtors applied to the Court below for a refund of the amount which had been realized from them in excess of the sum payable under the decree as amended. The Court below has allowed that application, and from the order of that Court this appeal has been preferred. In our judgment the application made by the judgment-debtors was not an application for execution of the decree, but an application under section 244 of the Code of Civil Procedure for restitution of an amount which had in execution of the decree been realized in excess. It is conceded by the learned vakil for the appellant that the application is not one to which article 179, schedule II, of the Limitation Act applies. There being no other article applicable, the article which would govern the application is article 178, which gives a period of three years from the time when the right to apply accrued. The question is, when did the right of the judgment-debtors to make their application arise? There cannot be any doubt that it was only when the decree was amended by this Court under its order of the 19th of April 1901 that the judgment-debtors' right to make the present application came into existence. Before that date they could not possibly have made any application for a refund of the amount which they now claim, as such application would have been inconsistent with the decree as it then stood. The learned vakil for the appellant contends that the judgment-debtors' right to apply accrued on the date on which the decree-holder realized a larger sum than what he was entitled to. But as we have already said, under the decree which subsisted at the time, the decree-holder was entitled to the amount which he recovered from the judgment-debtors by the sale of their property, and any application by the judgment-debtors for restitution would have been inconsistent with the terms of the decree as it then stood. It is only in consequence of the amendment of the decree on a subsequent date that the judgment-debtors became entitled to get back from the decree-holder the amount which they now claim. As the amendment was not made until the 19th of April 1901, the judgment-debtors' right to make the present application could not have arisen at an earlier date. The learned vakil for the appellant

1905

HARNAM  
CHANDAR  
v.  
MUHAMMAD  
YAB KHAN.

referred us to the ruling of this Court in *Daya Kishan v. Nanhi Begam* (1). That was a case in which the decree-holder obtained an amendment of the decree and applied for execution of the amended decree. The limitation applicable to that application was that prescribed by article 179, and his application was admittedly beyond time unless he could invoke in aid the application which he had made for amendment of the decree. That application was held not to be an application to the proper Court to take a step in aid of execution. The case therefore is distinguishable from the present. In our judgment the application made by the judgment-debtors was not beyond time, and this appeal must fail. We accordingly dismiss it with costs.

*Appeal dismissed.*

1905

February 3.

*Before Mr. Justice Sir William Burdett.*

AHMAD-UL-LAH KHAN (DEFENDANT) v. SALAR BAKHSH  
(PLAINTIFF).\*

*Act No. IV of 1882 (Transfer of Property Act), section 68—Mortgage—  
Right of mortgagee to sue for mortgage money.*

Where on the execution of a usufructuary mortgage the mortgagor fraudulently suppressed the fact that there was outstanding against the mortgaged property a decree for sale on a prior mortgage, and this decree was subsequently put into execution, it was *held* that the mortgagee was entitled, under section 68 (c) of the Transfer of Property Act, 1882, to sue the mortgagor for the mortgage money.

The mortgage in question contained a covenant that if any "khalal" occurred, the mortgagor would be responsible and would re-pay the mortgage money.

*Held*, that the expression "khalal" could not be confined to an unforeseen event or accident; but would include the consequences of conduct such as that of which the mortgagor had been guilty.

ON the 4th of April 1900 one Ahmad-ul-lah Khan executed a usufructuary mortgage of certain land in favour of Salar Bakhsh, and thereupon put the mortgagee in possession. The mortgagor, however, concealed from the mortgagee the fact that the land had been previously mortgaged to one Natho Kunwar

\* Second Appeal No. 1111 of 1902, from a decree of Babu Mata Prasad, Subordinate Judge of Moradabad, dated the 5th of September 1902, reversing a decree of Babu Mohan Lal Sandal, Munsif of Sambhal, dated the 17th of May 1902.



1905

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AHMAD-UL-  
LAH KHAN  
v.  
SALAR  
BAKHSH.

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in 1896, and that Natho Kunwar had brought a suit for sale on her mortgages and obtained a decree on the 4th of April 1899. Natho Kunwar executed her decree, and the property was put up for sale on the 20th of March 1902 and purchased by the second mortgagee, Salar Bakhsh. Salar Bakhsh then brought a suit against his mortgagor for recovery of the mortgage money, basing his claim on a covenant in the mortgage of the 4th April 1900, by which the mortgagor undertook that if any "khalal" occurred, he would be responsible and would repay the mortgage money. The Court of first instance (Munsif of Sambhal) dismissed the plaintiff's suit. This decree was, however, reversed on appeal by the Subordinate Judge of Moradabad. The defendant accordingly appealed to the High Court.

Mr. A. H. C. Hamilton (for whom Mr. G. W. Dillon), for the appellant.

Mr. A. E. Ryves, for the respondent.

BURKITT, J. — In the suit out of which this appeal has arisen, the plaintiff, respondent here, sued under section 68 of the Transfer of Property Act to recover from the defendant appellant the amount of Rs. 98, which had been advanced by the respondent to the defendant on the security of a usufructuary mortgage of certain land executed on the 4th April 1900 for a term of five years.

The land in question was, it appears, subject to two prior unregistered mortgages securing a sum of Rs. 70, executed in the year 1896, in favour of one Musammam Natho Kunwar. Natho Kunwar brought a suit for sale on her mortgage on the 22nd March 1899 and obtained a decree for sale thereon on the 4th April 1899. It thus follows that when the mortgage in favour of the plaintiff mortgagee was executed in April 1900, there was outstanding against that property a decree for sale just a year old. That decree of the 4th April 1899 was subsequently put into execution, and the property was sold on the 20th March 1902 and was purchased by the plaintiff, respondent here. Shortly afterwards, *i.e.*, on the 7th April 1902, the present suit was instituted by the present plaintiff respondent, Salar Bakhsh. He claimed to recover from the appellant Ahmad-ullah Khan Rs. 98, the mortgage money, *plus* a certain

1905

AHMAD-UL-  
LAH KHAN  
v.  
SALAR  
BAKHSH.

amount for damages. He based his claim on the wording of the deed of April the 4th, 1900, by which the mortgagor undertook that, if any "khalal" occurred, he would be responsible and would repay the mortgage money. But, strange to say, in his plaint he omits all mention of the fact that he was the person who purchased at the sale of the 20th March 1902. In consequence of objections raised by the defendant I remitted an issue to the lower Court to ascertain whether in pursuance of the terms of the mortgage the mortgagee had been put in possession, and whether mutation of names had been effected in his favour by the mortgagor. The lower appellate Court has now reported in the affirmative on both those matters. It appears that Salar Bakhsh, the respondent, was put into possession immediately on the execution of the mortgage of April the 4th, 1900, and also that his name was recorded in the village papers.

On behalf of the appellant it is contended that the plaintiff has not shown any grounds coming under section 68 of the Transfer of Property Act which could justify a Court in granting him a decree for repayment of the mortgage money. That was the view taken by the Court of first instance. It held, referring to the use of the word "khalal" in the mortgage-deed that that word meant an unforeseen event or accident, and therefore, as no such event or accident had happened, it refused the plaintiffs a decree.

"I am unable to concur in the very restricted meaning which that Court placed on the word "khalal." It seems to me that the view of the facts taken by the lower appellate Court is more correct as explaining what was meant by the word "khalal" in the mortgage-deed. For here the facts are that at the time when in April 1900 the usufructuary mortgage in favour of the plaintiff was created, the property which that mortgage purported to hypothecate was, and had been for a year, subject to a decree for sale at the suit of Musammatt Natho Kunwar. Further, it is found by both the Courts that the mortgagor, Ahmad-ul-lah Khan, had concealed from the plaintiff the existence both of the prior mortgages and the decree for sale on them, and, as found by the lower appellate Court, had

concealed that fact fraudulently. The result is that the property might have been put up for sale at any time after the plaintiff's mortgage and might have been sold over his head.

The fact that the plaintiff, to save the property of which he was in possession, purchased it at auction does not in my opinion affect the matter. It seems to me that the plaintiff's case comes within clause (c) of section 68, because the mortgagor failed to secure the possession of the property to the plaintiff without disturbance. The security the mortgagor gave to the plaintiff was absolutely illusory, and one of which he might have been deprived at any moment unless he chose to advance more money.

I am of opinion therefore that the plaintiff is entitled to his decree for the repayment of the mortgage money, but I do not think he is entitled to recover the interest at 2 per cent. by way of damages during the period from April 1900 to 20th March 1902, during which the plaintiff was actually in possession of the mortgaged property and was enjoying the usufruct.

To that extent the decree of the lower appellate Court must be modified. The plaintiff certainly would be entitled to damages from the 20th March 1902 to the 7th April 1902, the date of the institution of the suit, but this is a matter of a few days, and Mr. Ryves, for the respondent, does not press for that small amount. I therefore modify the decree of the lower appellate Court, and in lieu of the decree passed by that Court I give the plaintiffs a decree for Rs. 98, with interest thereon at the rate of six (6) per cent. per annum, up to date of payment.

*Decree modified.*

## REVISIONAL CRIMINAL.

*Before Mr. Justice Aikman.*

EMPEROR v. NARBADESHWAR.\*

*Act No. XLV of 1860 (Indian Penal Code), sections 225B and 353—Rescue from lawful custody — Legality of warrant — Civil Procedure Code, sections 82, 174.*

An Assistant Collector issued warrants for the arrest of certain witnesses, for whose attendance summonses had been issued, but who had not appeared

\* Criminal Revision No. 865 of 1904.

1905

AHMAD-UL-  
LAH KHAN

SALAR  
BAKSH.

1905  
February 7.

1905

EMPEROR

v.

NARBADSH-

WAR.

in obedience thereto. The serving officer had not been able to effect personal service of the summonses, but had affixed copies to the houses of the persons to be served. The Court previous to issuing warrants did not comply with the provisions of section 82 of the Code of Civil Procedure, though it was apparently of opinion that there had been due service of the summonses. The officers charged with the execution of the warrants arrested one of the witnesses, but they were attacked by N and others, and the man they had arrested was rescued. N was convicted under sections 225B and 353 of the Indian Penal Code. *Held* that even if section 225B was not applicable, the conviction under section 353 of the Code was perfectly justified.

THE facts of this case are as follows:—

On the 31st of August 1904 the Naib Nazir of Bansdih tahsil gave Suba and Bans Gopal, peons of that tahsil, a warrant signed by the Tahsildar (Assistant Collector of the 2nd class) of Bansdih for the arrest of Subh Narain and Mahipat Lal, two witnesses, who were wanted in a suit for arrears of rent. On the 1st of September 1904 the peons met Subh Narain, and showing him the warrant, arrested him. Subh Narain called for help, when four or five men, including one Narbadeshwar, came up, assaulted the peons and rescued Subh Narain from their custody. The peons reported the occurrence at the tahsil, and subsequently made a report at the Bansdih police station. Narbadeshwar was sent up by the police on charges under section 225B and section 353 of the Indian Penal Code and was convicted by a Magistrate of the 1st class and sentenced to three weeks' rigorous imprisonment. Narbadeshwar applied in revision to the Sessions Judge of Ghazipur, who accepted the contention of the applicant, and held that "the warrant against Subh Narain was issued without the service of summons by peon on door being declared sufficient or the peon being examined, and without any substituted service being ordered or made. Thus the warrant was issued practically without jurisdiction, and therefore the arrest was illegal, and the conviction under sections 353 and 225B of the I. P. C. was wrong." The Sessions Judge, however, found that the accused was guilty under section 352 of the Indian Penal Code, and, as he did not think the sentence was too much, refused to refer the case to the High Court. The applicant thereupon applied in revision to the High Court on the ground that "The learned Sessions Judge having found that the conviction was illegal was bound to refer the

case to this Honourable Court and had no power himself to come to a finding on the facts."

Sir *Walter Colvin* and Mr. *G. P. Boys*, for the applicant.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

AIKMAN, J.—The applicant, Narbadeshwar, was convicted by a Magistrate of the 1st class of offences punishable under sections 353 and 225B of the Indian Penal Code and sentenced to three weeks' rigorous imprisonment. When an accused is convicted of two different offences, a sentence should be awarded for each offence. If the Court deems it necessary the sentences may be made to run concurrently. It appears that a warrant was issued by an Assistant Collector for the arrest of certain witnesses who had failed to attend his Court. The warrant was issued under the authority of section 174 of the Code of Civil Procedure read with section 193 of the N.-W. P. Tenancy Act, 1901. One of these witnesses was arrested, and the applicant has been found guilty of rescuing that witness and assaulting the officers to whom the warrant had been made over for execution. In the warrant it is set forth that the summonses had been repeatedly served, but that the witnesses had failed to attend. It appears that three summonses were issued at intervals, but that in no case could the serving officer effect personal service. He consequently affixed a copy of the summons on the outer door of the witnesses' residence. The learned counsel contends that because it does not appear that the Court to which summonses were returned complied with the provisions of section 82 of the Code the warrant was illegal. It is true that the serving officer does not appear to have been examined on oath, and there is no declaration by the Court that the summons has been duly served. In my opinion, however, it is clear from the Court's order for the issue of the warrant that it was of opinion that there had been due service and that the witnesses were intentionally keeping out of the way. I am not therefore prepared to say that the warrant was absolutely illegal. In any case the officers charged with the execution of the warrants were acting in execution of their duty when they arrested the witness, and I have no hesitation in holding that on the finding

1905

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EMPEROR  
v.  
NARBADESH-  
WAR.

1905

N. EMPEROR  
v.  
NARBADESH-  
WAR.

of the Magistrate an offence under section 353 was committed. The assault, however, appears to have been of a trifling nature, and as the applicant has been released on bail by an order of a Judge of this Court, I think it unnecessary to direct that he surrender to undergo the term of ten days' imprisonment still left to be undergone. I therefore reduce the term of imprisonment to which the applicant was sentenced to that already undergone by the applicant. The result is that the applicant need not surrender and his bail is discharged.

## APPELLATE CIVIL.

1905  
February 10.

*Before Mr. Justice Knox and Mr. Justice Aikman.*

RAM DEI KUNWAR (PLAINTIFF) v. ABU JAFAR (DEFENDANT).\*

*Hindu law—Hindu widow—Sale by widow of deceased husband's property partly for legal necessity and partly not—Suit by next reversioner to recover property on death of widow—Limitation—Act No. XV of 1877, schedule II, Article 141.*

A separated Hindu died leaving him surviving his mother, two widows and a daughter. After the death of the mother and the widows, the daughter sued to recover certain property which had belonged to her father, but had been sold, by means of two sale-deeds, after his death by one of his widows. On the finding that one of the sales had been effected partly for legal necessity and partly not, and the other not for legal necessity, the Court decreed the plaintiff's claim as to the first sale on payment of such amount of the consideration for the sale as were supported by legal necessity, and as to the second sale unconditionally. On the finding that the suit was brought within twelve years from the date of the death of the surviving widow, both widows having survived the plaintiff's grandmother, it was held that the suit was not barred by limitation. *Gobind Singh v. Baldeo* (1) and *Jhamman Kunwar v. Tiloki* (2) followed.

THE facts of this case are fully stated in the order of remand made by the Court on the 5th of August 1904, which was as follows :—

KNOX, ACTING C. J., and AIKMAN, J. — One Bisheswar Singh died before 1857 leaving him surviving his mother

\* Second Appeal No. 571 of 1903 from a decree of Mr. Muhammad Ishaq Khan, District Judge of Azamgarh, dated the 30th of March 1903, reversing a decree of Pandit Girraj Kishore Das, Officiating Subordinate Judge of Azamgarh, dated the 16th of June 1902.

(1) (1903) I. L. R., 25 All., 330. (2) (1903) I. R. R., 25 All., 435.



1905

RAM DEI  
KUNWARv.  
ABU-JAFAR.

Musammat Sulagna, his two widows Musammat Ram Kali and Musammat Ram Jhari, and a daughter by the latter, Musammat Ram Dei Kunwar, who is the appellant in this case. On Bisheswar's death his property was divided between his two widows. On the 2nd of February 1859 Musammat Ram Kali sold her half share to the predecessors in title of the defendant respondent, Syed Abu Jafar. A suit was brought by her co-widow, Musammat Ram Jhari, to set aside this sale. On the 29th of December 1859 a decree was passed by the Sudder Amin, whereby the sale was held good as to a five and a half anna share. The decree went on to divide the property of Bisheswar amongst his mother, his widows and his daughter. A four anna share was assigned to the mother, a five and a half anna share to each of the widows and a one anna share to the daughter. On the death of the mother, Musammat Sulagna, the four anna share which had been assigned to her was divided between the widows, a two anna share going to each. The two anna share which Ram Kali had inherited from her mother-in-law, she on the 5th of May 1886, sold to the predecessor in title of the defendant respondent. This appeal has arisen out of a suit brought by the daughter Ram Dei after the death of her father's widows to recover from the defendant the seven and a half anna share of her father's property which had been alienated by Musammat Ram Kali. The Court of first instance held that the claim for the five and half anna share was barred by the provisions of section 13 of the Code of Civil Procedure, and dismissed the suit as to that share. With regard to the remaining two annas which had been sold by Ram Kali for a sum of Rs. 550, the Court held that the transfer by Ram Kali was, to the extent of Rs. 250, a transfer in lieu of proper consideration and for legal necessity. The remaining part of the consideration—Rs. 300—it found not to be a good consideration. The result was that the Court decreed the plaintiff's claim for a two anna share on payment by her to the defendant of Rs. 250 within a month. Against this decision the plaintiff appealed to the District Judge, and the defendant took objections under section 561 of the Code of Civil Procedure to the decree so far as it was in the plaintiff's favour.

1905

RAM DEI  
KUNWAR  
v.  
ABU JAFAR.

The learned District Judge dismissed both the appeal and the objections. The plaintiff comes here in second appeal, and the respondent also renews here the objections which he took in the Court below. For the appellant an attempt was made to show that the decision of the 29th December 1859 on which the Court below relied was of no effect as having been pronounced by a Court which had no jurisdiction to hear the suit. This plea was based on the allegation that the value of the property in suit was upwards of Rs. 1,000, which was the limit of the Sudder Amin's jurisdiction. In our opinion this plea has not been made out. The learned vakil has failed to show us that according to the rules for the valuation of suits then in force the suit was beyond the jurisdiction of the Sudder Amin. This preliminary point being disposed of, we have now to consider whether there was anything in the decision of the 29th of December 1859 to bar the plaintiff's suit. We have no hesitation in holding that, so far as the transfer of the five and half anna share is concerned, nothing took place in the previous suit to prevent the plaintiff maintaining her claim to that share. Ram Kali could, as to that share, have no higher interest than that of a Hindu widow. But she might still give a good title to the vendees if the sale was executed in lieu of proper consideration and on account of legal necessity. An issue was framed as to this. But, owing to the opinion formed by the Courts below as to the effect of the litigation in 1859, this issue was never tried. Before we can dispose of the appeal, therefore, we must ask the Court below to try this issue, *viz.*, whether the deed of the 2nd of February 1859 was executed by Musammat Ram Kali in lieu of proper consideration, and on account of legal necessity. There is another issue as regards the second sale deed which was raised in the defendant's objection to the lower Court and which the learned Judge has not yet tried. The learned Judge appears to have been under the impression that if the vendees acted in good faith, that of itself was enough to validate the sale-deed so as to make it a good transfer, not merely of the widow's interest, but of the absolute estate. In this view he is mistaken. The learned Judge will try the same issue in

1905

RAM DEI  
KUNWARv.  
ABU JAFAR.

regard to the sale deed of the 5th of May 1886 as he is directed to try in respect of the earlier sale-deed. He will take such additional evidence as may be necessary, and return his findings on the above issues along with any evidence he may find it necessary to record. The usual ten days will be allowed for objections on the return of the findings.

On findings being returned on the issues referred, the following judgment was delivered :—

The Hon'ble Pandit *Sundar Lal*, Mr. *J. Simeon* and Dr. *Satish Chandra Banerji*, for the appellant.

Mr. *Karamat Husain*, Maulvi *Ghulam Mujtaba* and Maulvi *Muhammad Ishaq*, for the respondent.

KNOX and AIKMAN, JJ.—The learned Judge of Azamgarh upon the issues referred for trial has found that both the sale deeds, *i.e.*, that of the 2nd of February 1859 and that of the 5th of May 1886, were executed for proper consideration and for legal necessity. These findings are impugned by objections taken under section 567 of the Code of Civil Procedure. We have heard all that has to be said by the learned counsel in the case. Being findings of a lower appellate Court, and this being a second appeal, we are bound by those findings so far as they are findings of fact. With reference to the sale of the 2nd of February 1859 the learned Judge has found that out of the consideration for the sale, *viz.* Rs. 2,995, the amount of Rs. 2,550 was to pay off a bond debt due by Bisheswar Singh, the husband of the vendor. To this extent there was in our opinion legal necessity for the sale. The balance is alleged to have been spent on religious purposes, *viz.*, charity and pilgrimage to Gaya. In our opinion, with reference to the circumstances of the estate, there was no necessity for the widow to incur this expenditure and sell a portion of the estate to defray it. As regards the second sale deed the learned Judge has found that Rs. 300 of the consideration was the debt due to Fazl Husain, Rs. 100 for payment of Government revenue, and the balance for construction of a well. Accepting the evidence as it stands, we think that it falls short of proof of the existence of such a legal necessity as would justify the alienation. In regard to the second sale it was

1905

RAM DEI  
KUNWARv.  
ABU JAFAR.

pleaded that the suit of the plaintiff was barred by limitation, inasmuch as her stepmother, the vendor, succeeded to it on the death of Musammat Sulagna, mother of Bisheswar. In our opinion this plea cannot be sustained. The plaintiff's right to claim the property did not arise until the death of Bisheswar's widows, and her suit was brought within 12 years of the date of their death. In this opinion we are supported by the decision in *Jhamman Kunwar v. Tiloki* (1), in which the authorities on the question are fully considered. We have found as to a portion of the consideration for the sale deed of 1859 that the sale was justified by legal necessity, and adopting the course laid down in *Gobind Singh v. Baldeo Singh* (2) we decree the plaintiff's claim for possession of a 1 anna, 7 ganda, 2 kauri share in each of the villages Harya and Rajipur and an 13 ganda, 1 kauri, 3 dant share in mauza Balaipur on condition of the plaintiff's paying into Court for the respondent the sum of Rs. 2,550 on or before the 1st of May 1905. If this amount is not paid in within the time fixed, the plaintiff's claim for the above shares in these three villages will stand dismissed. We decree the plaintiff's claim for possession of the property covered by the second sale deed, viz., a 10 ganda share in each of the villages Harya and Rajipur and a 6 ganda, 2 kauri, 2 dant share in mauza Balaipur. To this extent we allow the appeal. As the plaintiff has only partially succeeded, we direct that the parties bear their own costs here and in the Courts below. We dismiss the ~~on~~ <sup>an</sup> ~~action~~ <sup>appeal</sup> under section 561 of the Code of Civil Procedure.

*Decree modified.*

(1) (1903) I L. R., 25 All., 435.      (2) (1903) I. L. R., 25 All., 330.

## REVISIONAL CRIMINAL.

1905  
February 18.*Before Mr. Justice Aikman.*

EMPEROR v. ABDULLAH.\*

*Act No. VIII of 1873 (Northern Indian Canal and Drainage Act), sections 45, 47—Mode of collection of canal dues—Distraint—Act No. XLV of 1860 (Indian Penal Code), section 186.*

Where under a written order signed by a Tahsildar the Naib Nazir was directed to realize certain canal dues, and he, on attempting to do so by attachment and sale of the defaulter's property, was resisted by the owners of the property, it was held that the conviction of the persons offering resistance under section 186 of the Indian Penal Code was good. The Tahsildar's order, though not of a formal nature, was sufficient evidence that the Naib Nazir was acting as a public servant in the discharge of his duty. Held also that the appointment of lambardars does not preclude the Revenue authorities, if they think fit, from realizing canal dues from the persons by whom the dues are actually payable. *Queen-Empress v. Poomalai Udayan* (1), referred to.

IN this case certain canal dues payable under Act No. VIII of 1873 were to be realized from Abdullah and others. According to the local procedure, although lambardars had been appointed, it was customary in many cases to collect such dues from the persons who actually owed them. Accordingly the Tahsildar of Saharanpur, by a vernacular order signed by him, directed the Naib Nazir to realize the arrears due by Abdullah and others. The Naib Nazir, accompanied by one Chhajju Singh, a Tahsil peon, went to Abdullah's khaliyan, and showing the Tahsildar's order endeavoured to effect an attachment of the crops which were there. In this he was resisted by Abdullah and others, and had to return without accomplishing his purpose. Abdullah and two other men were charged under sections 186 and 352 of the Indian Penal Code, and were tried and convicted by a Magistrate of the first class and sentenced to fines. They applied in revision to the Sessions Judge who, being of opinion that the authority under which the Naib Nazir was acting was not legal authority, reported the case for the orders of the High Court under section 438 of the Code of Criminal Procedure. The learned Sessions Judge referred to

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\* Criminal Reference No. 855 of 1904.

1905

EMPEROR  
v.  
ABDULLAH.

*Abdul Gafur v. Queen-Empress* (2) and *Emperor v. Ganeshi Lal* (3), in support of his view.

The Assistant Government Advocate (Mr. W. K. Porter), for the Crown.

AIKMAN, J.—The Magistrate speaks of the attachment as having been made under section 47 of Act No. VIII of 1873. This appears to me to be a mistake, as section 47 refers to the recovery of canal dues by the Collector from lambardars who have been required under that section to collect and pay in canal dues. In this case the persons whose property was attached were not lambardars. In my opinion the appointment of a lambardar does not prevent the Collector from recovering from persons who have actually used canal water the amount due from them, that is, the appointment of a lambardar does not deprive the Collector of the power given him by section 45 of the Act. In the present case the Naib Nazir, who was a public servant, had an order from an Assistant Collector directing him to distrain for certain amounts due on account of canal rates. That order may not have been drawn up with the formality with which such an order should be prepared, but notwithstanding this I am of opinion that the distraining of the property was made by the lawful authority of a public servant, and it has been found that there was resistance to that distraint. The present case is distinguishable from the cases relied on by the learned officiating Sessions Judge, and the decision of the Magistrate is supported by the ruling to which he refers, *viz.*, *Queen-Empress v. Poomalai Udayan* (1). I therefore decline to interfere, and direct that the record be returned.

(1) (1896) I. L. R., 23 Calc., 896. (2) Weekly Notes, 1904, p. 229.  
(3) (1898) I. L. R., 21 Mad., 296.



## FULL BENCH.

1905  
February 18.*Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Sir William  
Burkitt and Mr. Justice Aikman.*SHAM SUNDAR AND OTHERS (JUDGMENT-DEBTORS) v. MUHAMMAD  
IHTISHAM ALI (DECREE-HOLDER).\**Act No. IV of 1882 (Transfer of Property Act), sections 86 and 87—Mort-  
gage—Suit for foreclosure—Appeal—Application for order absolute for  
foreclosure—Limitation—Execution of decree—Act No. XV of 1877  
(Indian Limitation Act), schedule II, article 178.*

The plaintiff sued for foreclosure of a mortgage which purported to comprise five villages. On the 19th of June 1899 he obtained a decree, but it was in respect of three villages only. As to these the decree provided for foreclosure in default of payment by the defendants of a sum of Rs. 39,584-6-8 on or before the 19th of December 1899. The plaintiff did not ask for an order absolute for foreclosure in respect of this decree, but appealed against the dismissal of his suit as regards the two remaining villages. This appeal was dismissed on the 4th of August 1902. No part of the mortgage money was paid; and on the 15th of September 1903, the decree-holder applied under section 87 of the Transfer of Property Act, 1882, for an order absolute for foreclosure. *Held* that the decree-holder's application was not barred by limitation. The nature of proceedings for foreclosure is such that a mortgage must be foreclosed as a whole or not at all. The decree-holder in this case could not have applied for an order absolute for foreclosure on the decree of the 19th of June 1899, without giving up his appeal from that decree. *Raham Illahi Khan v. Ghasita* (1) and *Poresh Nath Mojumdar v. Ramjodu Mojumdar* (2) referred to. *Oudh Behari Lal v. Nageshar Lal* (3) discussed and doubted. *Mul Chand v. Mukta Pal* (4) and *Maharaj Prasad v. Sital Singh* (5) referred to.

In this case one Muhammad Ihtisham Ali instituted a suit for foreclosure of a mortgage by which the mortgage pur-  
ported to hypothecate five villages. The title of the mortgage-  
gors to two of the villages was successfully impeached in the  
suit, and on the 19th of June 1899 a decree was passed under  
section 86 of the Transfer of Property Act, 1882, for foreclosure  
as regards three only of the villages mentioned in the mort-  
gage deed in default of payment by the defendants of a sum of  
Rs. 39,584-6-8 on or before the 19th of December 1899. The

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\* First Appeal No. 51 of 1904, from a decree of Shah Amjad-ullah, Subordinate Judge of Banda, dated the 23rd of November 1903.

(1) (1898) I. L. R., 20 All., 375. (3) (1890) I. L. R., 13 All., 278.  
(2) (1889) I. L. R., 16 Cal., 246. (4) Weekly Notes, 1896, p. 100.  
(5) (1897) I. L. R., 19 All., 520.

1965

SHAM  
SUNDAR  
v.  
MUHAMMAD  
IBTISHAM  
ALI.

plaintiff being dissatisfied with this decree appealed against so much of it as dismissed his suit in respect of the remaining two villages. This appeal was dismissed on the 4th of August 1902. On the 15th of September 1903, no part of the mortgage money having been paid, the decree-holder applied under section 87 of the Transfer of Property Act for an order absolute for foreclosure. To this the judgment-debtors objected on the ground that the decree passed on the 19th of June 1899 became absolute on the 19th of December 1899, the date fixed for payment; that on the last mentioned date the plaintiff became entitled to file an application for an order absolute under section 87 and that the plaintiff's present application, which was filed more than three years after the 19th of December 1899, was barred by article 178 of the second schedule to the Indian Limitation Act, 1877. The Court of first instance (Subordinate Judge of Banda) held, however, that the right to apply for an order absolute accrued to the decree-holder on the 4th of August 1902, when the decree of the High Court was passed, and accordingly disallowed the judgment-debtors' objection. The judgment-debtors thereupon appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, Pandit *Moti Lal Nehru* (for whom Pandit *Mohan Lal Nehru*) and Munshi *Gokul Prasad*, for the appellants.

Maulvi *Ghulam Mujtaba* (for whom Maulvi *Rahmat-ullah*), for the respondent.

STANLEY, C.J.—The question raised in this appeal is one upon which a divergence of opinion is to be found in the decisions of the several High Courts. The facts are shortly as follows. The respondent, Muhammad Ibtisham Ali, instituted a suit for foreclosure of a mortgage by which the mortgagors purported to hypothecate five villages. The title of the mortgagors to two of the villages was successfully impeached in the suit, and on the 19th of June 1899 a decree was passed under section 86 of the Transfer of Property Act for foreclosure as regards three only of the villages mentioned in the deed of mortgage in default of payment by the defendants of a sum of Rs. 39,584-6-8 on or before the 19th of December 1899. The

1905


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SHAM  
SUNDAR  
v.  
MUHAMMAD  
IHTISHAM  
ALI.

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Stanley, C. J.

plaintiff, being dissatisfied with the exclusion from the operation of this decree of two of the villages purported to have been hypothecated by the mortgage, preferred an appeal against so much of that order as dismissed his suit in respect of two of the mortgaged villages. This appeal was dismissed on the 4th of August 1902. No part of the mortgage debt was paid, and on the 15th of September 1903 the decree-holder applied under section 87 of the Transfer of Property Act for an order absolute for foreclosure. To this application the judgment-debtors objected on the ground that the decree passed on the 19th of June 1899 became absolute on the 19th of December 1899, the date fixed for payment; and that on the last mentioned date the plaintiff became entitled to file an application for an order absolute under section 87, and that the application for such order, which was filed on the 15th of September 1903, more than three years after the 19th of December 1899, was barred by article 178 of schedule II to the Limitation Act. The learned Subordinate Judge held that the starting point for computing limitation was the 4th of August 1903, the day on which the decree of the High Court was passed, and that therefore the application of the decree-holder was within time. The order absolute for foreclosure was accordingly passed on the 23rd of November 1903. From this order the present appeal has been preferred, and as the question involved in it is one upon which the authorities are not in accord, it was referred for determination to a Bench of three Judges.

All the authorities have been laid before us; but  do not think that any useful purpose would be served by lengthened comment upon them. The question involved appears to me to be one of principle, which can best be solved by keeping in view the true nature of a mortgage security and the remedies for the enforcement of that security which are provided by law. A mortgage in equity is a debt, the payment of which is secured upon land. In England upon the death of a mortgagee the benefit of the security devolves upon the personal representative of the mortgagee and not upon his heir; but in this country, in which the personal representatives are also the heirs, the devolution is to the heirs. Payment of the debt may be enforced by

1965

SHAM  
SUNDAR  
v.  
MUHAMMAD  
IBTISHAM  
ALI.

plaintiff being dissatisfied with this decree appealed against so much of it as dismissed his suit in respect of the remaining two villages. This appeal was dismissed on the 4th of August 1902. On the 15th of September 1903, no part of the mortgage money having been paid, the decree-holder applied under section 87 of the Transfer of Property Act for an order absolute for foreclosure. To this the judgment-debtors objected on the ground that the decree passed on the 19th of June 1899 became absolute on the 19th of December 1899, the date fixed for payment; that on the last mentioned date the plaintiff became entitled to file an application for an order absolute under section 87 and that the plaintiff's present application, which was filed more than three years after the 19th of December 1899, was barred by article 178 of the second schedule to the Indian Limitation Act, 1877. The Court of first instance (Subordinate Judge of Banda) held, however, that the right to apply for an order absolute accrued to the decree-holder on the 4th of August 1902, when the decree of the High Court was passed, and accordingly disallowed the judgment-debtors' objection. The judgment-debtors thereupon appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, Pandit *Moti Lal Nehru* (for whom Pandit *Mohan Lal Nehru*) and Munshi *Gokul Prasad*, for the appellants.

Maulvi *Ghulam Mujtaba* (for whom Maulvi *Rahmat-ullah*), for the respondent.

STANLEY, C.J.—The question raised in this appeal is one upon which a divergence of opinion is to be found in the decisions of the several High Courts. The facts are shortly as follows. The respondent, Muhammad Ibtisham Ali, instituted a suit for foreclosure of a mortgage by which the mortgagors purported to hypothecate five villages. The title of the mortgagors to two of the villages was successfully impeached in the suit, and on the 19th of June 1899 a decree was passed under section 86 of the Transfer of Property Act for foreclosure as regards three only of the villages mentioned in the deed of mortgage in default of payment by the defendants of a sum of Rs. 39,584-6-8 on or before the 19th of December 1899. The

1905

SHAM  
SUNDAR

v.

MUHAMMAD  
INTISHAM  
ALI.*Stanley, C. J.*

plaintiff, being dissatisfied with the exclusion from the operation of this decree of two of the villages purported to have been hypothecated by the mortgage, preferred an appeal against so much of that order as dismissed his suit in respect of two of the mortgaged villages. This appeal was dismissed on the 4th of August 1902. No part of the mortgage debt was paid, and on the 15th of September 1903 the decree-holder applied under section 87 of the Transfer of Property Act for an order absolute for foreclosure. To this application the judgment-debtors objected on the ground that the decree passed on the 19th of June 1899 became absolute on the 19th of December 1899, the date fixed for payment; and that on the last mentioned date the plaintiff became entitled to file an application for an order absolute under section 87, and that the application for such order, which was filed on the 15th of September 1903, more than three years after the 19th of December 1899, was barred by article 178 of schedule II to the Limitation Act. The learned Subordinate Judge held that the starting point for computing limitation was the 4th of August 1903, the day on which the decree of the High Court was passed, and that therefore the application of the decree-holder was within time. The order absolute for foreclosure was accordingly passed on the 23rd of November 1903. From this order the present appeal has been preferred, and as the question involved in it is one upon which the authorities are not in accord, it was referred for determination to a Bench of three Judges.

All the authorities have been laid before us; but we do not think that any useful purpose would be served by lengthened comment upon them. The question involved appears to me to be one of principle, which can best be solved by keeping in view the true nature of a mortgage security and the remedies for the enforcement of that security which are provided by law. A mortgage in equity is a debt, the payment of which is secured upon land. In England upon the death of a mortgagee the benefit of the security devolves upon the personal representative of the mortgagee and not upon his heir; but in this country, in which the personal representatives are also the heirs, the devolution is to the heirs. Payment of the debt may be enforced by

1905

SHAM  
SUNDAR  
v.  
MUTAMMAD  
IH TISHAM  
ALI.

Stanley, C. J.

sale or by foreclosure of the mortgaged property. Upon foreclosure the security is converted into land and the debt is discharged, the effect of the order absolute being to vest the equitable estate of the mortgagor in the mortgagee as effectually as if it had been conveyed by deed. In England the quality of personal estate is not lost until the final order for foreclosure has been passed (*Thompson v. Grant*, 4 Mad., 438). In that case Leach, V. C., observes that "there is neither authority nor principle for stating that the order of foreclosure relates back to the decree for the account, that is, to the decree nisi. It is only when an order absolute has been passed that the property becomes real estate, and as such devolves upon the heir." So in this country, the security in the hands of the mortgagee changes its character and becomes the immovable property of the mortgagee only, I think, when the order absolute has been passed.

The contention on behalf of the appellant in this appeal is that the case is governed by article 178 of schedule II to the Limitation Act, and that the right of the decree-holder to apply for an order absolute accrued on the 19th of December 1899, the date fixed by the decree of the Court of first instance for payment of the mortgage debt, and that the fact that the decree-holder had preferred an appeal in respect of the villages which had been excluded from the operation of the decree did not in those any stay upon the execution of so much of the decree as was not affected by the appeal; that, in other words, the decree holder was bound to apply for an order absolute within three years <sup>the</sup> the passing of the decree nisi, notwithstanding the pendency of his appeal in regard to the villages which were excluded from the operation of the decree. I am wholly unable to accede to this contention. If it be well founded, then it seems to me to follow that two decrees for foreclosure can be passed in respect of one and the same mortgage. This, as it appears to me, cannot be. If Muhammad Ihtisham Ali had applied for and obtained an order absolute under section 87 in respect of the three villages ordered to be foreclosed, I fail to see how it would have been open to him thereafter, if he succeeded in his appeal, to obtain an order absolute for foreclosure of the remaining portion of his security. Section 87



provides that "on the passing of an order under the second paragraph of this section (*i.e.*, an order for foreclosure) *the debt secured by the mortgage shall be deemed to be discharged.*" The discharge of the debt would surely furnish a good answer to any subsequent application for foreclosure. Again, if Muhammad Ihtisham Ali had, as it is said he was bound to do, obtained an order absolute for foreclosure in respect of the three villages within three years from the date fixed for payment by the decree of the 19th of June 1899 and had become possessed of these three villages and he afterwards succeeded in the appeal preferred in respect of the other two villages, then the Court would, according to the argument of the learned vakil for the appellants, have been bound to pass a decree nisi under section 86 for foreclosure as regards these last mentioned villages in default of payment of a debt which had been satisfied, or at least partially satisfied, by the operation of the order absolute already granted. Further, assuming that a decree nisi was passed for foreclosure of the villages which were excluded from the operation of the decree nisi first obtained, and that the mortgagors desired to redeem, they must do so apparently on payment of the entire amount of the debt, notwithstanding that the debt had been satisfied by the operation of the earlier order absolute. In such case also the mortgagors could not, so far as I can see, recover the villages which had already been foreclosed. It appears to me that the contention put forward on behalf of the appellants cannot be supported. So long as a decree nisi passed under section 86 is under appeal, the mortgagee in my opinion cannot obtain an order absolute under section 87 unless he first abandons his appeal. Until any order absolute has been obtained, the property is redeemable by the mortgagor—(*Raham Ilahi Khan v. Ghasita* (1), and *Poresb Nath Mojumdar v. Ramjodu Mojumdar* (2). It is unnecessary, as it appears to me, to consider whether article 178 or 179 has any application to a case of this kind. If it were necessary to decide this, we are confronted with the decision of a Full Bench of this Court in the case of *Oudh Behari Lal v. Nageshar Lal* (3), in which it

1905

SHAM  
SUNDAR

v.

MUHAMMAD  
IHTISHAM  
ALI.

Stanley, C. J.

(1) (1898) I. L. R., 20 All., 375. (2) (1889) I. L. R., 16 Calc., 246.

(3) (1890) I. L. R., 13 All., 278.

1905

SHAM  
SUNDARv.  
MUHAMMAD  
IRTISSAM  
ALI.

Stanley, C. J.

was held that an application for an order absolute for sale under section 89 of the Transfer of Property Act is a proceeding in execution and subject to the rules of procedure governing such matters. By that decision we are bound, but I confess that I have grave difficulty in following the reasoning of the learned Judge (Straight, J.) who delivered the judgment of the Court. He seems to me to have misapprehended the scope and object of sections 86 and 88 of the Transfer of Property Act. In the course of his judgment he observes:—

“Where a decree had been passed under sections 86, 87, 88, 89 or 92 directing payment into Court by a specified date of a sum of money, and in the event of it not being paid declaring that foreclosure or sale shall follow, or a right to redeem shall be barred, it would in my opinion be a misnomer, if payment is made, to describe such payment as other than one made in execution of decree. On the other hand it appears equally clear to me that if such payment is not made, the consequences which follow are also matters concerned with the execution of the decree, flowing as a matter of course out of the decree itself, viz., to give it effect against the judgment-debtor for having failed to satisfy the conditions of the decree. If decrees are properly prepared under sections 86, 88 and 92, they should fully set out these conditions and declare the consequences that will follow if they are or are not fulfilled.” Sir John Edge, C.J., and Tyrrell and Knox, JJ., contented themselves by expressing their concurrence in the judgment of Straight, J., while the Hon. Mr. Justice Mahmood, J., delivered a short judgment, in which, among other things, he said:—“I also agree in my brother Straight’s judgment, and also in everything he has said.” Now I may first point out that a decree nisi passed under section 86 for foreclosure or under section 88 for sale of mortgaged property *does not direct the payment into court of the mortgage debt*. What is directed by section 86 is that an account should be taken of what is due to the plaintiff for principal and interest on his mortgage, or declaring the amount due at the date of the decree and ordering that upon payment by the defendant to the plaintiff or into court of the amount so found to be due within a time fixed by the Court, the plaintiff is to deliver

1905

SHAM  
SUNDARv.  
MUHAMMAD  
IHTISHAM  
ALI.

Stanley, C. J.

up to the defendant all documents in his possession relating to the mortgaged property and transfer the property to the defendant, and, if necessary, put the defendant into possession. The decree passed under that section is not a money decree, no more is the order absolute which is passed under section 87. That order is an order absolute for foreclosure, and, so far from directing the payment of the mortgage debt, has the effect of discharging the debt. Chitty, J., in the case of *Burrows v. Halley* (1), says in regard to an order for foreclosure absolute:—"I need hardly say that an order absolute for foreclosure is not a money judgment or anything like it." Then Straight, J., observes that if payment is made by the mortgagor of the money found to be due it would be a misnomer "to describe such payment as other than one made in execution of decree." Now the decree not being a money decree and not directing the payment of money, I fail to see how any payment which the mortgagor may voluntarily make in order to preserve his property can properly be described as a payment made *in execution of the decree*. If in a foreclosure suit the mortgagor thinks fit to pay the mortgage debt and thus save his interest in the property, he does so by reason of the obligation which he undertook when he executed the mortgage security and with a view to preserve the property, and not in obedience to any order of the Court. The decree nisi puts him under no obligation to pay the debt, but simply declares what the consequences of non-payment will be. Similar observations apply to the order contemplated by section 88 of the Act. ~~As~~ have endeavoured to point out, the mortgage security does not lose its character until an order absolute for foreclosure has been passed. It remains a debt secured upon land. It is only when the order absolute for foreclosure has been passed that the debt is discharged, and in lieu of it the mortgagee acquires the absolute ownership of the land. The ruling in the case of *Oudh Behari Lal v. Nageshar Lal* renders unauthoritative the decision of my brother Burkitt in the case of *Ranbir Singh v. Drigpal* (2), a decision which was approved of by a Bench of the Calcutta

1905

SHAM  
SUNDAR  
v.  
MUHAMMAD  
IMTISHAM  
ALI.

High Court in the case of *Tilak Singh v. Parsotam Prasad* (1). It was held by my brother Aikman in *Mulchand v. Mukta Pal* (2), and by my brothers Banerji and Aikman in the case of *Mahabir Prasad v. Sital Singh* (3), that the period of limitation for the execution of a decree for sale under section 88 of the Transfer of Property Act begins to run from the date of the granting of the order absolute for sale under section 89, without which order the decree cannot be executed, and not from the date of the decree itself. In these rulings I entirely agree. For the reasons, then, which I have stated I would dismiss the appeal with costs.

BURKITT, J.—I also am of opinion that this appeal should be dismissed. I concur with the learned Chief Justice for the reason so fully set out by him in holding that there cannot be two foreclosure decrees in respect of one and the same mortgage, and that the plaintiff, respondent here, could not, during the pendency of his appeal as to the two villages which had been excluded from his foreclosure decree, have applied for an order absolute for foreclosure of the three villages as to which he had obtained a decree nisi for foreclosure. Had he applied for and obtained that order, the result, as pointed out by the learned Chief Justice, would have been the discharge of the mortgage debt.

Further, it seems to me that when the High Court by its appellate decree of August 4th, 1902, decided that the plaintiff was entitled to a foreclosure decree in respect of the three villages only, affirming the decision of the lower Court in respect of the other two, that decree became the only decree in the suit which was capable of execution, the earlier decree of June 1899 for foreclosure of the three villages being merged in it. It follows therefore that the application made by the mortgagee on September 15th, 1903, for foreclosure of the three villages was not time barred.

AIKMAN, J.—I am of the same opinion. No doubt the ordinary rule is that the institution of an appeal does not prevent execution of the decree or order which is under appeal.

(1) (1893) I. L. R., 22 Cal., 924. (2) Weekly Notes, 1896, p. 100.  
(3) (1897) I. L. R., 19 All., 520.

But the difficulties of applying this rule to decrees in foreclosure suits have been well pointed out by the learned Chief Justice, and his argument appears to me unanswerable. Proceedings to foreclosure must be proceedings to foreclose the mortgage as a whole. In the present case it was not until the 4th of August 1902 that there was any final decision as to the property to be foreclosed, and, this being so, I have no hesitation in holding that the respondent's application of the 15th of September 1903 for a decree absolute was within time.

BY THE COURT.—The order of the Court is that the appeal be dismissed with costs.

*Appeal dismissed.*

1905

SHAM  
SUNDARv.  
MUHAMMAD  
INTISHAM  
ALI.

## APPELLATE CIVIL.

1905

February 21.

*Before Mr. Justice Blair and Mr. Justice Banerji.*

ANAND SARUP (APPLICANT) v. SULTAN SINGH AND OTHERS

(OPPOSITE PARTIES).\*

*Act No. VI of 1882 (Indian Companies Act), sections 58, 147 and 169—Order in the matter of the winding up of a company by the Court—Appeal—Limitation.*

An order passed under section 58 read with section 147 of the Indian Companies Act, 1882, is still an order to which the limitation imposed by section 169 of the Act applies. No appeal against such order can, therefore, be heard unless the notice provided for by section 169 has been given.

THE appellant applied to the District Judge of Meerut to have his name registered as owner of 50 shares of the Instalment Banking Company, Meerut, of which he was original owner, but which were sold at auction by the Subordinate Judge on the 24th of December 1900, in execution of the decree of one Gopinath against the applicant and purchased by Sultan Singh and others, whose names were entered as purchasers on the 20th of August 1901. The District Judge, for reasons which need not here be detailed, disallowed this application. The applicant thereupon appealed to the High Court, but did not give notice of appeal in the manner provided for by section 169 of the Indian Companies Act, 1882.

\* First Appeal No. 66 of 1904 from an order of J. J. MacLean, Esq., District Judge of Meerut, dated the 26th of February 1904.

1905

ANAND  
SARUP  
v.  
SULTAN  
SINGH.

Mr. G. W. Dillon, for the appellant.

The Hon'ble Pandit *Sundar Lal* (for whom Pandit *Baldeo Ram Dave*) for the respondents.

BLAIR and BANERJI, JJ.—This is an appeal from an order rejecting the application of the appellant here to have his name entered in the register of the Instalment Banking Company, Limited, Meerut, now in liquidation. A preliminary objection to the hearing of this appeal was urged upon us by Mr. *Baldeo Ram*, who appears for the opposite party. He contended that the applicant's appeal must fail because of his failure to comply with the provisions of section 169 of the Companies Act, No VI of 1882. That section provides that no appeal from an order or decision made or given in the matter of the winding up of a company by the Court shall be heard unless notice of the same is given within three weeks after any order complained of has been made. It is not disputed that in this case no such notice has been given. But it is contended by Mr. *Dillon* that this was a case in which the application made was an application under section 58 of the same Act. That is the section which provides for the circumstances in which the register of shareholders may be rectified by a Court during the continuance of a company. By section 147 a Court is empowered, when a company is in liquidation, to make orders under the circumstances set out in section 58. Section 58, however, only gives authority to pass orders in a case where a company is a going concern. All applications made for rectification of the register after liquidation must be made under and by virtue of the authority conferred by section 147. We find it impossible to say that the present case is not a case to which the limitation imposed by section 169 applies. We therefore under the provisions of that section decline to hear the appeal, and order the appellant to pay the costs of the respondents.

*Appeal dismissed.*



*Before Mr. Justice Banerji.*RAM JATAN RAI (PLAINTIFF) *v.* RAMHIT SINGH AND ANOTHER1905  
February 22.

(DEFENDANTS).\*

*Act No. IV of 1882 (Transfer of Property Act), section 85—Parties—Mortgage of mortgagee rights—Suit by sub-mortgagee for sale of the interest of his mortgagor.*

*Held* that in a suit by a sub-mortgagee to recover a debt secured by a mortgage of the defendant's rights as mortgagee the defendant's mortgagor is not a necessary party. In such a suit the plaintiff cannot bring to sale the mortgagee rights of the defendant. *Ganga Prasad v. Chunni Lal* (1) referred to.

THE plaintiffs in this case, who were mortgagees of the mortgagee rights of some of the defendants in various zamin-dari shares, sued their mortgagors and two persons alleged to be purchasers of the mortgagee rights of their mortgagors, namely, Ramhit Singh and Ramjao Singh, to recover the mortgage debt by sale of their mortgagors' interest in the mortgaged property. And they also alleged that Ramhit and Ramjao had undertaken a personal liability for the debt. The original mortgagors were not made parties to the suit. The Court of first instance (Subordinate Judge of Azamgarh) gave the plaintiffs a decree under section 88 of the Transfer of Property Act, 1882, for sale of the interest mortgaged to them. The defendants, Ramhit and Ramjao, appealed. The lower appellate Court (District Judge of Azamgarh) came to the conclusion that the original mortgagor, Musammatt Anarkali, and one Janki, a purchaser of a portion of the hypothecated property, should have been made defendants to the suit, and, holding that their non-joinder was a fatal defect, allowed the appeal and dismissed the plaintiff's suit. The plaintiff thereupon appealed to the High Court.\*

Mr. *Abdul Raoof*, for the appellant.

Babu *Surendro Nath Sen*, for the respondents.

BANERJI, J.—In this case the lower appellate Court has dismissed the suit on the ground that necessary parties had not been joined as defendants. That ground cannot be supported.

\* Second Appeal No. 876 of 1903, from a decree of Nawab Muhammad Ishaq Khan, District Judge of Azamgarh, dated the 16th of September 1903, reversing a decree of Babu Jai Lal, Subordinate Judge of Azamgarh, dated the 13th of September 1902.

1905

RAM JATAN

RAI

v.

RAMHIT

SINGH.

It appears that the defendants Nos. 1 and 2 executed a bond in favour of the plaintiff in which they hypothecated certain property of which they were mortgagees, so that the mortgage in plaintiff's favour was a mortgage of the mortgagee rights, that is to say, it was a sub-mortgage. The plaintiff brought his suit for the recovery of the amount alleged to be due to him and for the sale of the mortgagee rights mortgaged to him. The respondents here are purchasers of a portion of the mortgaged property, that is, of a portion of the mortgagee rights of the plaintiff's mortgagors. The plaintiff further stated in his plaint that those defendants had undertaken a personal liability to pay the money due to the plaintiff. The Court of first instance, apparently overlooking the rulings of this Court on the point, made a decree under section 88 of the Transfer of Property Act for the sale of the mortgagee rights. The lower appellate Court dismissed the plaintiff's suit on the ground that the mortgagor of the plaintiff's mortgagors had not been made a party. According to the ruling of this Court in *Ganga Prasad v. Chunni Lal* (1), which was followed in subsequent cases, no decree can be made under the Transfer of Property Act for the sale of mortgagee rights. In that case it was pointed out that the only remedy to which the sub-mortgagee was entitled was a decree for money against his mortgagor, and that he could in execution of that decree possibly have attached the mortgagee interests of his mortgagor. As, according to the rulings of this Court, the plaintiff could not get a decree for sale of the mortgagee rights sub-mortgaged to him, but could only obtain a money decree, the mortgagor of his mortgagors was not a necessary party to the suit, and the lower appellate Court was entirely in error in dismissing the suit on the ground that he had not been made a party. Unfortunately for him the plaintiff has not joined as parties to this appeal his mortgagors; and the only persons who are respondents to this appeal are the defendants Nos. 7 and 8, who are purchasers of a portion of the mortgagee rights of the plaintiff's mortgagors. Ordinarily the plaintiff would not be entitled to a money decree against them, and consequently his claim for a money decree could not be maintained as against

them. In the present case, however, the plaintiff states in the third paragraph of his plaint that these defendants took upon themselves to pay the amount of the debt due to the plaintiff and that they had only paid a part of that debt. This allegation was denied on behalf of these defendants, who contended that they had paid all that the plaintiff was entitled to get from them. These questions were not tried by the lower appellate Court. As the preliminary ground on which that Court has dismissed the suit cannot be supported, I allow this appeal, set aside the decree of the lower appellate Court in so far as it affects the respondents here, namely, the defendants Nos. 7 and 8, and remand the case to the lower appellate Court under section 562 of the Code of Civil Procedure with directions to readmit it under its original number in the register and dispose of all questions which are in issue between the plaintiffs and the defendants respondents. Costs here and hitherto will follow the event.

*Appeal decreed and cause remanded.*

1905

RAM JATAN  
RAI  
v.  
RAMHIT  
SINGH.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*

JADUNATH PRASAD (PLAINTIFF) v. GIRDHAR DAS AND ANOTHER

(DEFENDANTS).\*

1905  
February 23.

*Trust—Suit for possession of trust property as manager—Limitation—Act No. XV of 1877, schedule II, articles 124, 144.*

Where the plaintiff claimed possession of certain trust property as manager by right of inheritance from the founders of the trust, there being no allegation of misappropriation of the trust property, it was held that the limitation applicable to such suit was that prescribed by articles 124 or article 144 of the second schedule to the Indian Limitation Act, 1877, and began to run from the time when the possession of the defendant became adverse to the plaintiff, *Balwant Rao v. Puran Mal* (1), referred to.

THE facts of this case are as follows :—

In the year 1882 two persons, Babu Hari Das and Babu Mahabir Prasad, made an endowment of certain immovable property for the worship of an idol. They appointed two trustees,

\* Second Appeal No. 262 of 1903 from a decree of J. Sanders, Esq., District Judge of Benares, dated the 22nd of December 1902, confirming a decree of Maulvi Muhammad Siraj-ud-din, Subordinate Judge of Benares, dated the 19th of September 1902.

1905

JADUNATH  
PRASAD  
v.  
GIRDHAR  
DAS.

who refused to act, and therefore they themselves managed the trust property so long as they were alive. After the death of Mahabir Prasad, the survivor of the two founders of the trust, the trust property was managed by his widow Mukandi Bibi. She died in 1885, and after her death the property was managed by Babu Bisheshwar Prasad, a cousin of the founders of the trust, until his death in 1894. After this event the management came into the hands of Sundar Bibi the daughter of Bisheshwar Prasad, who transferred it to one Girdhar Das by an instrument dated the 24th of February 1901. Thereupon the present suit was instituted by Jadunath Prasad, son of Baij Nath Prasad, another cousin of the founders of the trust, against Girdhar Das and Sundar Bibi. The plaintiff claimed to be entitled to the management of the trust property as next male heir of the founders of the trust, but did not allege against the defendants any misappropriation of the trust property. The defendants on the other hand asserted that they were entitled to the management. The court of first instance (Subordinate Judge of Benares) dismissed the suit as being barred by limitation, and the lower appellate Court (District Judge of Benares) confirmed this decree. Both Courts held that the management of the trust by Bisheshwar Prasad and his daughter Sundar Bibi constituted adverse possession as against the plaintiff. The plaintiff appealed to the High Court.

Dr. *Satish Chandra Banerji* and Babu *D. N. Ohdedar* for the appellant.

The Hon'ble Pandit *Sundar Lal* and Babu *Harendra Krishna Malkerji*, for the respondents.

STANLEY, C. J. and BANERJI, J.—This appeal arises in a suit brought by the appellant for possession of certain immovable property of which an endowment was made by Babu Hari Das and Babu Mahabir Prasad in 1882 for the worship of an idol. They appointed two trustees, who refused to act, and therefore they themselves managed the trust property so long as they were alive. After the death of Babu Mahabir Prasad, the survivor of the two founders of the trust, the management was in the hands of his widow Mukandi Bibi. She died in 1885, and after her the property was managed

1905

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JADUNATH  
PRASAD  
v.  
GIRDHAR  
DAS.

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by Babu Bisheswar Prasad, a cousin of the founders of the trust, until his death in 1894. The defendant, Sundar Bibi, is his daughter. She having transferred the management of the property to Babu Girdhar Das, defendant, by an instrument dated the 24th of February 1901, this suit has been brought by the plaintiff, who is the son of Babu Baij Nath Prasad, another cousin of Babus Hari Das and Mahabir Prasad. He asserts that as the next male heir of the founders of the trust he is entitled to manage the trust property, and accordingly claims the property as manager thereof. The Court of first instance dismissed the suit, holding the claim to be barred by limitation. The lower appellate Court has affirmed this decree, and both Courts have held that the management of the trust by Bisheswar Prasad and his daughter Sundar Bibi for more than twelve years next preceding the institution of the suit constituted adverse possession. The learned District Judge referred in his judgment to article 18, schedule II, Limitation Act. That article has manifestly no application to the present case. He probably meant to refer to article 118 of the Second Schedule to Act No. IX of 1871, which corresponds to article 120 of the Second Schedule of the present Limitation Act (No. XV of 1877) and which provides for cases to which no specific article in the schedule is applicable. It is contended on behalf of the appellant that the Courts below have erred in holding the claim to be barred by limitation.

It is clear that section 10 of the Limitation Act is applicable, inasmuch as the defendants do not deny the endowment, but on the contrary assert their own right as managers of the endowment, and it is not the plaintiff's case that the property has been applied to purposes other than those of the trusts of the endowment. This was held by their Lordships of the Privy Council in *Balwant Rao v. Puran Mal* (1). That was a case very similar to the present. The High Court had held that "so far as the suit is for a declaration that the plaintiff is, by right of inheritance, chief manager of the temple services and properties, it falls within article 123 of the Limitation Act. The Act applicable to this suit is Act IX of 1871, and

1905

JADUNATH  
PRASAD  
v.  
GIRDHAR  
DAS.

in so far as it seeks recovery of possession of the temple property, it falls within article 145 of the same Act." Their Lordships of the Privy Council saw no reason for differing from the High Court in thinking that the suit fell within article 123 or article 145, but they did not decide the point. They were also of opinion that if neither of those articles applied the suit would be governed by article 118. The articles of the present Limitation Act corresponding to the articles mentioned above are articles 124, 144 and 120. So that the suit is governed either by the 12 years' rule of limitation provided by articles 124 and 144 or by the six years' rule prescribed by article 120. We are of opinion that as the plaintiff in this case claims the office of manager by right of inheritance and seeks to recover possession of the trust property, the period of limitation for the suit is 12 years under articles 124 and 144, to be computed from the date on which the defendants or their predecessors in title took possession adversely to the plaintiff. Neither of the Courts below has come to any distinct finding as to the date on which adverse possession was taken and also as to the date of the accrual of the plaintiff's right. Those Courts ought to have determined on whom the right of management devolved upon the death of Makundi Bibi in 1885 and whether Bisheswar Prasad held the office of manager adversely to the persons who acquired the right of management or on behalf of all of them. The Courts below have further overlooked the fact that at the date of Makundi Bibi's death the plaintiff was admittedly a minor. We are informed that he continued to be a minor till 1899. If that is so, and if the right of the plaintiff accrued upon the lady's death, the suit, which was brought in 1901, was within time. These questions have not been determined, and, as the learned advocate for the respondent admits, the case has not been properly tried. We therefore allow the appeal, set aside the decrees of the Courts below, and remand the case to the Court of first instance with directions to readmit it under its original number in the register and try it according to law, bearing in mind the observations made above. Costs here and hitherto will be costs in the cause.

*Appeal decreed and cause remanded.*



*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.*

1905  
February 23.

MUHAMMAD ABDUL RASHID KHAN AND OTHERS (PLAINTIFFS) v. DIL-SUKH RAI AND ANOTHER (DEFENDANTS).\*

*Act No. IV of 1882 (Transfer of Property Act), section 99—Mortgage—Sale of equity of redemption by mortgagor—Purchase of equity of redemption by mortgagee in execution of a decree against mortgagor's vendees—Effect of such purchase—Suit by mortgagor's vendees for redemption—Parties.*

The equity of redemption in certain mortgaged property was sold by the mortgagor to third parties. In execution of a decree for costs and mesne profits the mortgagee brought the equity of redemption in the hands of the purchasers to sale and purchased it himself. Years after this the purchasers of the equity sued to redeem the mortgaged property, treating the sale to the mortgagee as a nullity. They did not implead in this suit the representatives of the original mortgagee. *Held* that the suit must fail for want of proper parties. But in any case the purchase by the mortgagee of the equity of redemption was voidable only and not void, and could not after the lapse of some twenty years be impeached. *Tara Chand v. Imdad Husain* (1) and *Mayan Pathuti v. Pakuran* (2) approved. *Khairaj Mal v. Daim* (3), *Bhuggobutty Dossee v. Shamachurn Bose* (4). *Martand v. Dhondo* (5) and *Sheodeni Tewari v. Ram Saran Singh* (6) referred to.

THE facts of this case are as follows:—

One Ram Bakhsh executed a usufructuary mortgage on the 5th of February 1863 of a 10-biswa share in mauza Lodha Mai in favour of one Debi Das, to secure an advance of Rs. 7,700, the term being 11½ years and the mortgagee taking the profits in lieu of interest, but paying a sum of Rs. 100 to the mortgagor as *malikana*. The mortgage contained a provision that on redemption the mortgagor should pay to the mortgagee whatever arrears were found to be due by tenants and also the cost of constructing *pacca* wells. On the 28th of June 1866 Ram Bakhsh sold his equity of redemption in 7 biswas out of the 10 biswa share to the plaintiffs, Abdul Rashid Khan, Aziz Khan, and Mahmud Khan, for a sum of Rs. 10,000. These plaintiffs and the plaintiff Musammat Altaf Begam and Musammat Ummat-ul-Rasul are the sons and daughters of one Zahur Ahmad Khan. Zahur Ahmad Khan on the 20th of November 1871 purchased a 2 biswa 19 biswansi 10 kachwansi share of the

\* First Appeal No. 262 of 1902 from a decree of Maulvi Maula Bakhsh, Additional Subordinate Judge of Aligarh, dated 29th of August 1902.

(1) (1896) I. L. R., 18 All., 325. (4) (1876) I. L. R., 1 Calc., 337.  
(2) (1899) I. L. R., 22 Mad., 347. (5) (1897) I. L. R., 22 Bom., 624.  
(3) (1904) L. R., 32 I. A., 23. (6) (1898) I. L. R., 26 Calc., 164.

1905

MUHAMMAD  
ABDUL  
RASHID  
KHAN  
v.  
DILSUKH  
RAI.

share then owned by Ram Bakhsh, leaving only a 10 kachwansi share in the ownership of Ram Bakhsh. This 10 kachwansi share the mortgagee Debi Das subsequently purchased. The plaintiffs Nos. 1 to 3 instituted a suit for redemption of the mortgaged property in the Court of the Subordinate Judge of Mainpuri, and obtained a decree for redemption on the 25th May 1878, conditional on payment of a sum of Rs. 6,967-1-4. Debi Das, mortgagee, was not satisfied with the sum awarded to him, and preferred an appeal to the High Court from this decree, and on the 2nd of June 1879 the decree of the Court below was modified and the mortgagors were directed to pay, in addition to the sum already directed to be paid, a sum of Rs. 8,956 14-11 on account of arrears of rent and enhanced revenue. Before this, namely, on the 17th of November 1877, the plaintiffs 1 to 3 had deposited in Court the sum of Rs. 7,700, the principal amount secured by the mortgage of the 5th of February 1863. Out of this amount the mortgagee drew out of Court on the 12th of June 1878 the sum of Rs. 6,988-7-4 and surrendered possession of the mortgaged property. The mortgagors having failed to pay the additional sum, directed to be paid by the decree of the High Court, Debi Das applied to the Court to have possession restored to him. His application was granted and possession was given to him on the 1st of April 1880. Thereupon he applied in execution for the costs awarded by the High Court and mesne profits for the period during which he was out of possession, namely, Rs. 5,615-14-10, and, the plaintiffs in the redemption suit having failed to make payment, their equity of redemption in the property was put up for sale and was purchased by Debi Das himself on the 20th of August 1881 for a sum of Rs. 5,748. The sale was confirmed and a sale certificate granted on the 11th of February 1882. On the 24th of July 1886 Debi Das executed a mortgage of his interest in the 10 biswa share of the property in favour of Jamna Das and Salig Ram, and later on the heirs of these mortgagees brought to sale the mortgagee rights of Debi Das in 9 biswas 19 biswansis and 10 kachwansis, and the defendants Dilsukh Rai and Ali Ahmad became the purchasers of these rights on the 28th of January 1897. On the 7th of December

1901 the plaintiffs Nos. 1 to 3 sold to the plaintiff Pandit Parbhu Dial a 4-biswa share in the property, and on the 1st of February 1902 the suit out of which this appeal has arisen was instituted by the plaintiffs for redemption of the property, their allegation being that the sale of the 20th of August 1881 of the equity of redemption in the mortgaged property to Debi Das, the mortgagee, was illegal and void, and that therefore the representatives of the mortgagor were entitled to redeem. The Court of first instance (Additional Subordinate Judge of Aligarh) held that that sale was valid and that the plaintiffs did not possess any right to redeem. It further found that the suit was barred by limitation, and accordingly dismissed it. The plaintiffs appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, The Hon'ble Pandit *Sundar Lal* and Dr. *Satish Chandra Banerji*, for the appellants.

Pandit *Moti Lal Nehru* (for whom Babu *Durga Charan Banerji*) and Pandit *Mohan Lal Nehru*, for the respondents.

STANLEY, C.J., and BURKITT, J.—The facts of this case are somewhat complicated. They are these. One Ram Bakhsh executed a usufructuary mortgage on the 5th of February 1863 of a 10-biswa share in mauza Lodha Mai in favour of one Debi Das, to secure an advance of Rs. 7,700, the term being 11½ years and the mortgagee taking the profits in lieu of interest, but paying a sum of Rs. 100 to the mortgagor as *malikana*. The mortgage contained a provision that on redemption the mortgagor should pay to the mortgagee whatever arrears were found to be due by tenants and also the cost of constructing *pacca* wells. On the 28th of June 1866 Ram Bakhsh sold his equity of redemption in 7 biswas out of the 10 biswa share to the plaintiffs, Abdul Rashid Khan, Aziz Khan, and Mahmud Khan, for a sum of Rs. 10,000. These plaintiffs and the plaintiffs Musammat Altaf Begam and Musammat Ummat-ul-Rasul are the sons and daughters of one Zahur Ahmad Khan. Zahur Ahmad Khan, on the 20th of November 1871, purchased a 2 biswa, 19 biswansi, 10 kachwansi share of the share then owned by Ram Bakhsh, leaving only a 10 kachwansi share in the ownership of Ram Bakhsh. This 10 kachwansi share the mortgagee, Debi Das, subsequently purchased. The plaintiffs

1905

MUHAMMAD  
ABDUL  
RASHID  
KHAN  
v.  
DILSUKH  
RAI.

1905

MUHAMMAD  
ABDUL  
RASHID  
KHAN  
v.  
DILSUKH  
RAI.

Nos. 1 to 3 instituted a suit for redemption of the mortgaged property in the Court of the Subordinate Judge of Mainpuri, and obtained a decree for redemption on the 25th May 1878, conditional on payment of a sum of Rs. 6,967-1-4. Debi Das, mortgagee, was not satisfied with the sum awarded to him, and preferred an appeal to the High Court from this decree, and on the 2nd of June 1879 the decree of the Court below was modified and the mortgagors were directed to pay, in addition to the sum already directed to be paid, a sum of Rs. 8,956-14-11 on account of arrears of rent and enhanced revenue. Before this, namely, on the 17th of November 1877, the plaintiffs Nos. 1 to 3 had deposited in Court the sum of Rs. 7,700, the principal amount secured by the mortgage of the 5th of February 1863. Out of this amount the mortgagee drew out of Court, on the 12th of June 1878, the sum of Rs. 6,988-7-4 and surrendered possession of the mortgaged property. The mortgagors having failed to pay the additional sum directed to be paid by the decree of the High Court, Debi Das applied to the Court to have possession restored to him. His application was granted and possession was given to him on the 1st of April 1880. Thereupon he applied in execution for the costs awarded by the High Court and mesne profits for the period during which he was out of possession, namely, Rs. 5,615-14-10, and, the plaintiffs in the redemption suit having failed to make payment, their equity of redemption in the property was put up for sale and was purchased by Debi Das himself on the 20th of August 1881 for a sum of Rs. 5,748. The sale was confirmed and a sale certificate granted on the 11th of February 1882. On the 24th of July 1886 Debi Das executed a mortgage of his interest in the 10 biswa share of the property in favour of Jamna Das and Salig Ram, and later on the heirs of these mortgagees brought to sale the mortgagee rights of Debi Das in 9 biswas 19 biswansis and 10 kachwansis, and the defendants Dilsukh Rai and Ali Ahmad became the purchasers of these rights on the 28th January 1897. On the 7th of December 1901 the plaintiffs Nos. 1 to 3 sold to the plaintiff Pandit Parbhu Dial a 4-biswa share in the property, and on the 1st of February 1902 the suit out of which this appeal has arisen was

1905

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MUHAMMAD  
ABDUL  
RASHID  
KHAN  
v.  
DILSUKH  
KAT.

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instituted by the plaintiffs for redemption of the property, their allegation being that the sale of the 20th of August 1881 of the equity of redemption in the mortgaged property to Debi Das, the mortgagee, was illegal and void, and that therefore the representatives of the mortgagor were entitled to redeem. The lower Court held that that sale was valid and that the plaintiffs did not possess any right to redeem. It further found that the claim was statute barred, and dismissed the suit. Hence the present appeal.

It will be observed from the foregoing statement of the facts that the plaintiffs Nos. 1 to 3 were the purchasers from Ram Bakhsh of a 7-biswa share out of a 10-biswa share which was the subject matter of the mortgage. Their father only purchased a 2 biswa, 19 biswansi, 10 kachwansi share. Consequently, upon the death of Zahur Ahmad Khan, his daughters, the plaintiffs Nos. 4 and 5, became entitled to a share in the share so purchased by him, that is, one-fourth between them of this share. The area of this share is stated to be not more than about 47 bighas. The plaintiffs appellants Nos. 1 to 3 applied to the Court to have the sale of the 20th of August 1881 set aside on the ground of alleged inadequacy in the price, but this application was rejected and the sale was confirmed on the 9th of February 1882. Later on, in a petition of objection filed by some of the appellants on the 30th of October 1897 to an application which was made by the respondents for mutation of names, these appellants acknowledged that the equity of redemption in the mortgaged property had passed to Debi Das on the purchase of the 20th of August 1881. They alleged that on that date Debi Das had only a title as such purchaser and that the mortgagee rights of which the petitioners claimed to be purchasers were extinguished on the 20th of August 1881. The appellants, Musammat Ummat-ul-Rasul and Musammat Altaf Begam, were minors in 1881, and they were not parties to the suit for redemption which was filed in the Court of the Subordinate Judge of Mainpuri in 1877. The other appellants were also minors at the date of this suit. They sued under the guardianship of their mother, Mariam-un-nisa. The contention on behalf of the appellants now is that a mortgagee cannot in execution of a decree obtained

1905

MUHAMMAD  
ABDUL  
RASHID  
KHAN  
v.  
DILSUKH  
RAI.

by him, not being a decree obtained upon his mortgage, bring to sale and himself purchase the equity of redemption of his mortgagor; that such a purchase is void, and that the equity of redemption, notwithstanding such sale, would still remain outstanding in the hands of the mortgagor. As authority for this contention the case of *Martand Balkrishna Bhat v. Dhondo Damodar Kulkarni* (1) is relied on. In that case it was held that the purchase by a mortgagee of property sold by him in execution of a money decree did not free him from liability to be redeemed as mortgagor; that the sale to him was rendered nugatory by the impossibility of a mortgagee by such a sale and purchase freeing himself from the liability to be redeemed. The Judges who decided this case adopted the proposition laid down in the case of *Bhuggobutty Dossee v. Shamachurn Bose* (2), namely, that "a mortgagee is not entitled by means of a money decree obtained on a collateral security, such as a bond or covenant, to obtain a sale of the equity of redemption separately, because by so doing he would deprive the mortgagor of the privilege which, upon the principle of considering the estate as a pledge, a Court of equity always accords to a mortgagor, namely, a fair allowance of time to enable him to discharge the debt and recover the estate. This privilege is an equitable incident of the contract of mortgage, and it would be inequitable to permit the mortgagee to evade it; to do that circuitously which he could not do directly." Then the learned Judges observe that "that is the principle which in an extended form is enacted as law in section 99 of the Transfer of Property Act." Later on they observe as follows:—"In the present case it seems impossible to say that the mortgagee did not avail himself of his position to obtain an undue advantage in the purchases, or otherwise act *mala fide*." They then say that "the question is one of difficulty and doubt, but seeing that the Legislature has now adopted the principle in its widest aspects we think that we are justified in acting upon it." A Bench of the Calcutta High Court held in the case of *Sheodeni Tewari v. Ram Suran Singh* (3) that retrospective effect ought to be given to section 99 on the ground

(1) (1897) I. L. R., 22 Bom., 624. (2) (1876) I. L. R., 1 Cal., 337.

(3) (1898) I. L. R., 26 Cal., 164.



1905

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MUHAMMAD  
ABDUL  
RASHID  
KHAN  
v.  
DILSUKH  
RAI.

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that the mode of enforcing a decree is a matter of procedure and that a sale in contravention of the section is absolutely unlawful. This is not consistent with the view taken by a Bench of this High Court in the case of *Tara Chand v. Imdad Husain* (1). In that case Edge, C.J., and Blennerhasset, J., held that where a mortgagor's interest in property was sold by a Revenue Court in execution of a decree for rent in contravention of the provisions of section 99, and the sale was upheld on appeal to the Board of Revenue, the decision was final as between the judgment-debtor and the judgment-creditor in the rent suit. This decision commends itself to us. In the case of *Mayan Pathuti v. Pakuran* (2) this question was considered, and it was held that a sale in execution of a decree obtained by the mortgagee not connected with the mortgage was contrary to the provisions of section 99, yet that the sale was not void but voidable. Subramania Ayyar, J., in his judgment observes that "the sale which is impeached is doubtless contrary to the provisions of section 99 of the Transfer of Property Act. The first point for determination is whether, as contended for the appellants, the mortgagors, the private sale is altogether null and void. The argument that in allowing the sale to take place against the provisions of the said section, the Court acted without jurisdiction is obviously unsustainable. Still, if the above section were enacted for the protection of public interests and the law were to be regarded as laying down a rule of general policy rendering the prohibition absolute, the sale would be void, but if the section in question has been introduced for the benefit only of a particular class of persons the sale would be but voidable." The learned Judge refers to some text books in support of this, and continues:—"That it is of the latter description is apparent, the object being to protect only persons concerned with the right to redeem mortgaged property. The sale cannot therefore be held to be void." The learned Judge guarded himself from its being understood that he laid down that a mortgagor would be precluded from redeeming the property, and says:—"It may be that the sale in question cannot

(1) (1896) I. L. R., 18 All., 325. . (2) (1899) I. L. R., 22 Mad., 347.

1905

MUHAMMAD  
ABDUL  
RASHID  
KHAN  
S.  
DILSUKH  
RAI.

affect that right of the appellant owing to the impossibility of respondent as the mortgagee freeing himself by such a sale and purchase from the liability to be redeemed."

Independently of the provisions contained in section 99 of the Transfer of Property Act we are not prepared to hold that a mortgagee is precluded by law from purchasing the equity of redemption and freeing himself from his liability to be redeemed provided that the purchase is carried out in complete good faith and no advantage is taken by him of his position as mortgagee. We are not aware of any principle upon which such a sale can be impeached merely on the ground that the purchaser was a mortgagee of the purchased property. In the recent case of *Khairaj Mal v. Daim* (1), which came before their Lordships of the Privy Council, their Lordships in the course of their judgment observe:—"But the Judge has made a decree for redemption of the whole estate on the ground 'that the mortgagees could not acquire the equity of redemption directly or indirectly by purchase at a court sale, except by a suit brought on the mortgage, on account taken and time specially allowed for redemption.' Their Lordships cannot concur in this view, which they think is based on a misapplication of a sound principle of equity. Their Lordships throw no doubt on the principle which has been acted on in many cases in India that a mortgagee cannot by obtaining a money decree for the mortgage debt and taking the equity of redemption in execution relieve himself of his obligations as mortgagee or deprive the mortgagor of his right to redeem on accounts taken and with the other usual orders usual in a suit on the mortgage." Their Lordships here reject the notion that mortgagees cannot acquire the equity of redemption in mortgaged property by purchase at a court sale except by a suit brought on the mortgage, though they recognise the principle of equity that a mortgagee cannot by obtaining a money decree for the mortgage debt and taking the equity of redemption in execution relieve himself of his obligations as mortgagee or deprive the mortgagor of his right to redeem. In the case before us the equity of redemption was not sold in execution of a money decree obtained for the mortgage

debt. It was sold in execution of a decree for costs and mesne profits. The plaintiffs Abdul Rashid Khan, Abdul Aziz Khan and Mahmud Khan, as we have pointed out, endeavoured to have the sale to Debi Das set aside, but failed in that attempt. We are at a loss to see how after a lapse of more than twenty years these appellants can now successfully set up the case that the sale was a nullity.

But there seems to us to be a fatal objection to the suit of the plaintiffs appellants, and that is to be found in the fact that the legal representatives of Debi Das have not been impleaded. The Court cannot declare the sale of the 20th of August 1881 to be a nullity in the absence of the parties who are interested in upholding it. On the ground of non-joinder of necessary parties alone we think that the suit fails and that the appeal must be dismissed. But it is contended that as the plaintiffs Musammat Altaf Begam and Musammat Ummat-ul-Rasul were not parties to the suit for redemption instituted by their brothers the sale in execution of the decree for costs and mesne profits had in that suit is a nullity as regards them at least and that they are entitled to redeem. Reliance is placed in support of this contention on the decision of their Lordships in the case to which we have just referred, in which it was pointed out that, where a Court purported to sell in execution of a decree the equity of redemption in mortgaged property some of the owners of which were not parties to the proceedings or properly represented in the record "as against such persons the decrees and sales purporting to be made would be nullities and might be disregarded without any proceedings to set them aside." It is true that Musammat Altaf Begam and Musammat Ummat-ul-Rasul are in no way bound by the sale of the 20th of August 1881 and that they are entitled to redeem the small portion of the mortgaged property to which they became entitled on the death of their father in a suit properly constituted for that purpose, but we express no opinion as to this. They, as also their brothers, were minors when the suit for redemption was brought in the name of their brothers by their mother as guardian, and it may be that under such circumstances it would be held that the estate of Ram Bakhsh, the mortgagor, was sufficiently represented in

1905

MUHAMMAD  
ABDUL  
RASHID  
KHAN  
v.  
DILSUKH  
BAI.

1905

MUHAMMAD  
ABDUL  
RASHID  
KHAN  
v.  
DIPSUKH  
RAI.

the redemption proceedings. In the case before the Privy Council to which we have referred their Lordships say:—"The Indian Courts have properly exercised a wide discretion in allowing the estate of a deceased mortgagor to be represented by one member of the family and refusing to disturb judicial sales on the mere ground that some members of the family who were minors were not made parties to the proceedings, if it appears that there was a debt justly due from the deceased and no prejudice is shown to the absent minors." We, however, decide nothing as to this. We may point out too that this is not the case which these ladies set up in their claim. They made common cause with their brothers, the other plaintiffs, and claimed redemption of all the property comprised in the mortgage of the 5th of February 1863. As the integrity of the mortgage was broken by the purchase by Debi Das, the mortgagee, of the equity of redemption in part of the mortgaged property, these appellants would only be entitled in any case to redeem their own share, that is, the one-fourth of 2 biswas, 19 biswansis, 10 kachwansis. To the obtaining, however, of this relief there is the objection that they have not impleaded the legal representatives of Debi Das, the original mortgagee. We hold therefore that in the present suit in which the legal representatives of Debi Das have not been impleaded the plaintiffs cannot obtain any relief. We accordingly dismiss the appeal with costs.

*Appeal dismissed.*

1905  
February 23.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burdett.*

MUSTAFA KHAN AND OTHERS (DEFENDANTS) v. PHULJA BIBI (PLAINTIFF)  
AND YAKUB KHAN AND OTHERS (DEFENDANTS).\*

*Civil Procedure Code, sections 520, 525 and 526—Arbitration—Application to file a private award.—Award in excess of powers of arbitrator—Court no authority to remit award.*

A Court to which an application is made under section 525 of the Code of Civil Procedure to file an award made without the intervention of a Court has no power to amend the award or to remit it for reconsideration, but only possesses the power to file and enforce it or to reject the application.

\* First Appeal No. 36 of 1903, from a decree of Maulvi Muhammad Shafi, Subordinate Judge of Gorakhpur, dated the 10th of November 1902.

*Alarakhia Shivji v. Jehangir Hormasji* (1), *Juala Singh v. Narain Das* (2), *Mana Vikrama v. Mallichery Kristnan Nambudri* (3) and *Dandekar v. Dandekars* (4), followed.

1905

MUSTAFA  
KHAN  
v.  
PHULJA  
BIBI

THIS appeal arose out of an application under section 525 of the Code of Civil Procedure made by one Phulja Bibi to have an award made without the intervention of the Court filed in Court. The parties to this proceeding were joint owners, of property of considerable value situate in the districts of Basti, Fyzabad and Lucknow. On the 23rd of August 1899 they appointed one Faiz Khan as arbitrator to partition the property amongst them; and the arbitrator made his award on the 11th of December 1901. The application of Phulja Bibi was presented on the 20th of December 1901. The opposite parties took various objections to the award which, however, the Court (Subordinate Judge of Gorakhpur) overruled and, after correction of a clerical error in the award, directed that a decree be prepared in accordance with the terms thereof. The opposite parties appealed to the High Court, urging that the award was in various respects not within the powers of the arbitrator; that the Court had no jurisdiction to order the award to be filed, and that the decree of the Court below was not in accordance with the award.

Mr. *Abdul Majid* and *Maulvi Muhammad Ishaq*, for the appellants.

The Hon'ble Pandit *Sundar Lal* and Pandit *Moti Lal Nehru*, for the respondents.

STANLEY, C.J., and BURKITT, J.—This appeal arises out of a suit for a decree upon an award under the provisions of section 525 of the Code of Civil Procedure. The parties to the suit are the owners of considerable property situate in the districts of Basti, Fyzabad and Lucknow. Differences and disputes arose amongst them as to the ownership and distribution of this property, which they agreed to refer to arbitration. The award was passed upon the submission on the 11th of December 1901. Soon after an application was made under section 525 to have the award filed and a decree passed thereon. This was resisted by the appellants on a number of grounds, amongst others,

(1) (1873) 10 Bom., H. C. Rep., 391.

(2) (1881) I. L. R., 3 All., 541.

(3) (1880) I. L. R., 3 Mad., 68.

(4) (1882) I. L. R., 6 Bom., 663.

1905

MUSTAFA  
KHAN  
v.  
PHULJA  
BIBI.

that the arbitrator had determined matters which were not referred to him. It is contended that if this objection is well founded the Court has no power to file the award or to pass a decree thereon. We have therefore to consider in this appeal the operation and effect of sections 525 and 526 of the Code. Section 525 enables the Court to file an award in a matter which has been referred to arbitration without the intervention of the Court, that is, what is sometimes described as a "private arbitration." Section 526 provides that "if no ground such as is mentioned or referred to in section 520 or 521 be shown against the award, the Court shall order it to be filed, and such award shall then take effect as an award made under the provisions of this Chapter." Section 520 enables the Court to remit the award or any matter referred to arbitration for the reconsideration of the arbitrator on the ground, amongst others, that the award determines any matter not referred to arbitration. It is contended that if a ground of objection, such as is mentioned in section 520, is shown against the award, the Court cannot remit the award or any matter referred to arbitration for the reconsideration of the arbitrator, that the only course open to the Court in such a case is to reject the application and to refuse to file the award. This matter was considered in the case of *Alarakhia Shivji v. Jehangir Hormasji* (1), where it was held upon the construction of section 327 of Act VIII of 1859, corresponding with section 526 of the present Code, after hearing learned arguments upon the question, that the Court had no power to amend a private award or remit it for reconsideration, but only possessed the power to file and enforce it or reject it. This ruling was followed in *Juala Singh v. Narain Das* (2), *Mana Vikrama v. Mullichery Kristnan Nambudri* (3) and *Dandekar v. Dandekars* (4). We see no reason whatever for dissenting from this ruling. It appears to us upon careful consideration of section 526 that no other course is open to the Court than that which is pointed out in these decisions.

We now come to consider whether or not any objection to the award in this case within the meaning of section 520 has

(1) (1878) 10 Bom., H. C. Rep., 391.

(2) (1881) I. L. R., 3 All., 541.

(3) (1880) I. L. R., 3 Mad., 68.

(4) (1882) I. L. R., 6 Bom., 663.



1905

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MUSTAFA  
KHAN  
v.  
PHULJA  
BIBI.

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been established. The submission to arbitration clearly expresses the powers which were conferred upon the arbitrator. They were (1) to determine the amount and nature of the share of each of the parties; (2) to determine what property jointly belonged to them and under whose management and in whose possession such property was; (3) in partitioning the property to determine how much of any particular property should be given to any of the parties, or to deprive any party of any particular property; and (4) to award that goods or cash be transferred or paid by any party to any other party. These provisions appear to us clear and definite. Now let us see what the arbitrator purported to do. He bestowed a great deal of labour in ascertaining the complex and varying interests in the property of the parties, and in determining the questions which were left to him to determine, and no doubt made an honest and fair award as far as we can judge; but the award appears to us to be faulty in several respects. In the first place the arbitrator has placed restrictions upon the full enjoyment of some portions of the property which he allotted to two of the parties, which he was not justified in placing. For example, in the case of Musammat Phulja Bibi he found that she was entitled to a certain share, but, not content with so finding, he proceeds to place restrictions upon her power to deal with the share so awarded to her. He directs that, with the exception of the male descendants of Ghulam Rasul Khan, she should not transfer her share in whole or in part to the daughters of the family, or to the relations of her father-in-law, or to strangers, adding a proviso that if the male descendants of Ghulam Rasul Khan cause her inconvenience and neglect to maintain her, she should be at liberty to sell her property even to a stranger. It was not within the power of the arbitrator to place any restrictions upon any party in regard to the enjoyment of his share and in this respect it appears to us that the arbitrator has determined matters which were outside the submission. It has been contended by the learned advocate for the respondents that as the arbitrator was empowered to determine the *nature* of the share which each party should obtain, the restriction imposed upon the enjoyment of the property awarded to this lady was

1905

MUSTAFA  
KHAN  
v.  
PHULJA  
BIBI.

within the powers of the arbitrator. We are unable to place this meaning upon the words "nature of the share." What was intended by the use of this expression we are unable to say, but the meaning of it certainly seems to us not to be so wide as to authorize the arbitrator to place the restriction which he has done in the case of Musammat Phulja Bibi. Again, certain parts of the property were awarded to Rustam Khan, and in his case also the arbitrator places a restriction upon his enjoyment. He states in the award that Rustam Khan had agreed to give a share to Rahmat-ul-lah Khan, and then he provides in the award that Rustam Khan "must always abide by his own statement and that he should not transfer the whole or part of his share to anyone, nor should he create any charge upon it." This clearly appears to be outside the powers conferred by the submission. Again, we find that there were a number of debts outstanding in connection with a timber trade carried on in Lucknow. These debts the arbitrator was in the ordinary course bound to partition or divide among the parties. He did not, however, do so, but by the award he directed that Bandhu Khan, one of the appellants, and he only, should collect these debts and account to the other parties in respect of them. Now Bandhu Khan objects to this provision in the award, and not unnaturally. He says that he was not conversant with the trade which was carried on in Lucknow and is not in a position to give his time and labour to the collection of the debts. He also says that in all probability he will be involved in serious litigation if he accepts the responsibility cast upon him by the award. In this also it appears that the arbitrator has gone outside the provisions of the submission and has given cause to the appellants to object to the award. This being so and having regard to the decisions referred to above there is no course open to us but to allow this appeal, set aside the decree of the Court below, and reject the application. It only remains then to consider the question of costs. We have carefully considered the judgment of the Court below, and we find in it no reference whatever to the grounds of appeal upon which the appellants have succeeded in this Court. The parties gave evidence in the Court below upon a number of issues which

were settled. These issues have largely to do with alleged misconduct on the part of the arbitrator and none of them is directed to the question which has been now determined by the Court in favour of the appellants upon the effect of section 526 coupled with section 520 of the Code. Upon the other questions the appellants have not satisfied us that the Court below was wrong. We, therefore, think that the parties ought respectively to abide their own costs in both Courts, and we so direct. We wish it to be understood that we decide this appeal entirely upon the question of the true meaning of section 526 and that we do not determine any other question raised before the Court below.

1905

MUSTAFA  
KHAN  
v.  
PHULJA  
BIBI.

*Appeal decreed.*

## REVISIONAL CIVIL.

1905

*February 24.*

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*

LT.-COL. J. G. TURNER (DEFENDANT) v. JAGMOHAN SINGH  
(PLAINTIFF).\*

*Tort—Right of defence of person or property against the attack of a vicious animal—Revision—Act No. IX of 1887 (Provincial Small Cause Courts Act), section 25.*

A vicious stallion repeatedly attacked on the public road a pair of mares belonging to the carriage in which the defendant was being driven, and finally came into the defendant's compound, in spite of attempts made to prevent him, and continued his attacks until the defendant getting hold of a spear inflicted a somewhat severe wound on the left hind-quarter of the animal. After this the horse made off, but subsequently died from the effects of the spear wound. *Held* that under the circumstances the defendant's action was perfectly justifiable, and the owner of the horse was not entitled to any damages on account of his loss. *Morris v. Nugent* (1) referred to. *Held* also that the powers conferred by section 25 of Act No. IX of 1887 are wider than those given by section 622 of the Code of Civil Procedure.

THE facts out of which this case arose were as follows:—

On the evening of the 24th of March 1904, Colonel and Mrs. Turner were being driven home from a garden party in the carriage of Mr. Chesney, the Editor of the *Pioneer*, drawn by two mares, when, at the turning of the *Pioneer* Office, they were overtaken by a young two-year-old country-bred

\* Civil Revision No. 56 of 1904.

[(1) (1836) 7 Car. and P. 572.]

1905

TURNER  
v.  
JAGMOHAN  
SINGH.

stallion, the property of the plaintiff. The horse attacked the mares, first coming at their heads, when the coachman whipped him off; he then turned round and kicked at them, but being at close quarters did no damage. Further on on the road the horse again resumed the attack, but was beaten off. At the Railway crossing, which is close to Colonel Turner's house, the horse again rushed up at the mares screaming and kicking. Colonel Turner jumped out of the carriage and tried to beat off the horse with a croquet mallet, telling the coachman to drive home quickly. He himself stood at the gate of the compound with the croquet mallet in his hand to keep off the horse and shouted out to Mr. Chesney to send him out a polo stick. The animal forced his way past, either jumping the compound fence or going through the gateway. The evidence on this point is not quite clear. Colonel Turner at once ran to the porch, when Mr. Chesney handed him a spear. The stallion, who had been madly careering in the compound, again rushed at the mares, and as he was charging up Colonel Turner lunged at him with the spear and drove him off. The horse then galloped off to the other side of the house, and again came round from that side and made for the carriage, which was still under the porch, when the servants who had then collected scared him off. He galloped away, and ultimately left the compound. The spear struck the horse in the left hind-quarter, inflicting a severe wound, from the effects of which the horse died the following day.

The owner of the horse, Jagmohan Singh, brought a suit against Colonel Turner in the Court of Small Causes at Allahabad claiming Rs. 300 as the value of the horse, and costs of the suit. The Court gave the plaintiff a decree as prayed. The defendant thereupon applied in revision to the High Court under section 25 of the Small Cause Courts Act, 1887, upon the main ground that "the judgment and decree passed by the lower Court are not in accordance with the law governing the subject matter of the suit."

Mr. C. Ross Alston, for the applicant.

The Hon'ble Pandit Sundar Lal, for the opposite party.

STANLEY, C.J., and BANERJI, J.—This case comes before the Court under the revisional powers conferred by section 25

1905

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TURNER  
v.  
JAGMOHAN  
SINGH.

of the Provincial Small Cause Courts Act. The suit was brought by Jagmohan Singh against the defendant, now Lieutenant-Colonel commanding the 4th Bengal Cavalry, but then Major in that Corps, to recover damages for the loss of a horse caused by a spear wound inflicted by Colonel Turner. The facts of the case are not disputed, and are shortly these. On the evening of the 24th of March 1904, Colonel and Mrs. Turner were being driven home from a garden party in the carriage of Mr. Chesney, the Editor of the *Pioneer*, drawn by two fast mares, when, at the turning of the *Pioneer* Office, they were overtaken by a young two-year-old country-bred stallion, the property of the plaintiff. The horse attacked the mares, first coming at their heads, when the coachman whipped him off: he then turned round and kicked at them, but being at close quarters did no damage. Further on on the road the horse again resumed the attack, but was beaten off. At the railway crossing, which is close to Colonel Turner's house, the horse again rushed up at the mares screaming and kicking. Colonel Turner jumped out of the carriage and tried to beat off the horse with a croquet mallet, telling the coachman to drive home quickly. He himself stood at the gate of the compound with the croquet mallet in his hand to keep off the horse and shouted out to Mr. Chesney to send him out a polo stick. The animal forced his way past, either jumping the compound fence or going through the gateway. The evidence on this point is not quite clear. Colonel Turner at once ran to the porch, when Mr. Chesney handed him a spear. The stallion, who had been madly careering in the compound, again rushed at the mares, and as he was charging up Colonel Turner lunged at him with the spear and drove him off. The horse then galloped off to the other side of the house, and again came round from that side and made for the carriage, which was still under the porch, when the servants who had then collected scared him off. He galloped away, and ultimately left the compound. The spear struck the horse in the left hind-quarter, inflicting a severe wound, from the effects of which the horse died the following day. Colonel Turner, who, as one would expect, has great experience of horses, deposed that he "never saw a more vicious

1905

TURNER  
v.  
JAGMOHAN  
SINGH.

or determined attack," and that it was impossible for anyone to catch the horse by the reins as it was so vicious. He described the animal as a "screaming stallion." These facts are deposed to by Colonel and Mrs. Turner, and by Mr. Chesney, and are not controverted. Mrs. Turner was so much terrified that she could with difficulty be restrained from jumping out of the carriage before it entered the compound. The plaintiff in his evidence deposed that the horse was a country-bred which he had bought a few months previously at the *Magh Mela* for Rs. 300, and that it was a quiet animal. On the evening on which the occurrence took place he stated that he had ridden the horse to the house of one Pandit Chandika Prasad and there handed him over to the charge of some person; that after the lapse of about 20 minutes he saw the horse running away. The person into whose custody the horse is alleged to have been given was not examined, and we are therefore left in the dark as to how the animal managed to break loose. A *post mortem* examination showed that the horse died from the effects of the spear wound, and the question for our determination is whether Colonel Turner was, under the circumstances, in the defence of person and property, justified in inflicting the wound. Previous to the attack which we have recounted the horse had made a determined and vicious attack in the public road on a horse which was being driven by Mr. Campbell, late Joint Magistrate of Allahabad. Mr. Campbell deposed that the horse kicked both his horse and dog-cart and injured several spokes of one of the wheels. He galloped up from behind, rushed open mouthed, ~~attacking~~ at his horse. He attacked repeatedly and kicked his horse in the mouth. The animal, he said, had apparently lost all control over himself, attacking his horse and cart with teeth and heels. Luckily, as Mr. Campbell says, his horse was a quiet old troop horse, otherwise he does not know what would have happened. The learned Judge of the Small Cause Court came to the conclusion that Colonel Turner exceeded the right of defence of person and property by using the spear, and seemed to be of opinion that if he and his servants had made an effort to catch the horse they could have done so and thus prevented any mischief. He accordingly decreed the plaintiff's



1905.

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TURNER  
v.  
JAGMOHAN  
SINGH.

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claim and awarded him Rs. 300 damages. The learned Judge seems to us not to have fully appreciated the aggressive resources of a screaming stallion. The evidence of the witnesses shows that the horse was in such an infuriated condition that he could not be caught or held, and we have little doubt that, if the man in whose charge it was left by the plaintiff had been examined, it would have transpired that the horse broke loose from him. The learned Judge lays down the law in these words:—"The law on the subject as laid down in Underhill on Torts (p. 305, 7th edition) is that the remedy of the owner of land for trespasses committed by cattle is by seizing the animals while trespassing and detaining them until reasonable compensation is made, not only for damage done to the land, but also for damage, if any, done to the animals of the owner of the land. And it is said by Sir Frederick Pollock, at page 448 of his Law of Torts, that the test in such cases is whether the party's act was such as he might reasonably in the circumstances think necessary for the prevention of harm which he was not bound to suffer." He then observes:—"Applying this test to the present case, I think that, taking all the defendant says as to the horse having attacked his carriage on the road and in his compound to be true, he was yet not justified in using his spear at him. I do not agree with Major Turner in thinking that the spear was used innocently or simply to drive the brute away, for Major Turner himself says that, if he could, he would have shot the horse." This latter remark is based upon a statement which was made by Colonel Turner to the Police when they came to investigate the matter, namely, that if he could he would have shot the horse, as he was justified in doing so. This statement of Colonel Turner is taken by the Judge to be proof that he did not use the spear innocently or simply to drive the stallion away. This appears to us a wholly wrong inference from the statement of Colonel Turner to the Police. The reasonable inference is that so vicious and infuriated was the horse that in self-defence he would have been justified in shooting and would have shot him. The learned Judge seems to regard a screaming stallion at large in a compound as coming within the category of animals which could be readily secured

1905

TURNER

v.

JAGMOHAN  
SINGH.

and detained. He seems to have little appreciation of the resources of such a brute when he suggests that the defendant or one of his servants could have caught him if any attempt to do so had been made. No doubt when the horse had become exhausted it was possible to secure him, but before that grave injury might have been inflicted. If Colonel Turner had not used a spear and driven the horse off, it is hard to say whether he or one of the *syces*, to say nothing of the mares, would not have met with serious injury. The occurrence is fortunately an unusual one. We know of no reported case in which in the defence of person or property a horse has been killed. In the case of dogs the law is well settled. To justify the shooting of another person's dog, it is not sufficient to show that the dog was of a ferocious disposition and was at large, but it must also be shown that the animal was actually attacking the party at the time. If a dog, whether he be of a mischievous disposition or not, attack a man, the party attacked has sufficient justification for shooting him in self-defence—*Morris v. Nugent*, (1). The principle of law which is applicable in the case of dogs is equally applicable in the case of horses. If a horse attacks a man, the person attacked is fully justified in protecting himself or his property by all reasonable means, the test being, as laid down by Sir F. Pollock, in the case of attack by an animal, whether the party's act was "such as he might reasonably in the circumstances think necessary for the prevention of harm which he was not bound to suffer." The force used must not be out of proportion to the apparent exigencies of the occasion. The right of defence must not be abused as it so readily may be; but if a person who is acting on the defensive uses only such force as he reasonably believes to be necessary he is protected. We have no hesitation in this case in holding that the act of Colonel Turner was such as any reasonably minded man might have considered necessary under the circumstances, and that he was fully justified in using the spear as he did in the protection of person and property. There is no ground whatever for supposing that he acted with any other intention than to drive away the stallion, or that he used any more force than

(1) (1836) 7 Car. and P. 572.

he believed to be necessary to avert impending injury. Owners of vicious and dangerous animals are bound to keep such animals under restraint and not permit them to wander on the public roads and into private compounds to the danger of the public. If they neglect to do so, they must take the consequences. This suit ought not in our opinion to have been brought.

The learned advocate for the respondent in the course of his argument submitted that we should not in revision lightly disturb a finding of fact of the lower Court. We are at one with him in this. But the evidence given for the defence in this case is not controverted, and, if accepted, as it has been by the Court below, furnishes a complete answer to the suit. The power of interfering in revision conferred by the Small Cause Courts Act is wide—wider than the power conferred by section 622 of the Civil Procedure Code, and if substantial grounds are shown for the interference of the Court, the Court is not merely justified in exercising, but acts reasonably in the exercise of, its revisional powers. In the present case we are of opinion that a grave injustice would be done if the decree of the Court below were allowed to stand.

We therefore set aside the decree of the lower Court and dismiss the plaintiff's suit with costs in this Court and in the Court of Small Causes.

*Appeal decreed*

## APPELLATE CIVIL.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Banerji.*

MUHAMMAD RAHMAT-ULLAH (PLAINTIFF) *v.* BACHCHO (DEFENDANT).\*

*Civil Procedure Code sections 313 and 315—Execution of decree—Sale in execution of property to part of which only the judgment-debtor had a title—Rights of purchaser—Contribution.*

In execution of a decree for sale on a mortgage part of the mortgaged property was sold by auction, but after the sale it was found that the judgment-debtor had no title to about two-thirds of the property sold. The

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\* Second Appeal No. 256 of 1903, from a decree of Khan Bahadur Mir Akbar Husain, Judge of Small Cause Court, exercising powers of the Subordinate Judge of Allahabad, dated the 22nd of December 1902, reversing a decree of Babu Sris Chandar Bose, Munsif of Allahabad, dated the 1st of September 1902.

1905

TURNER

*v.*

JAGMOHAN  
SINGH.

1905  
February 25.

1905

MUHAMMAD  
RAHMAT-  
UL-LAH  
v.  
BACHCHO.

auction purchaser then sued the representatives of the mortgagee for contribution as against the remainder of the mortgaged property. *Held* that the suit would not lie. An auction purchaser has in the absence of fraud no remedy unless the judgment-debtor has no saleable interest at all in the property sold as his, and then only under sections 313 and 315 of the Code of Civil Procedure; but these sections do not apply when the title of the judgment-debtor to part only of the property sold is defective. *Shanto Chandar Mukerji v. Nain Sukh* (1) followed.

DHUMAN KHAN and Muhammad Husain mortgaged jointly four houses, two belonging to each of them, to Thakur Prasad. After the death of Dhuman Khan, Thakur Prasad brought a suit for sale on his mortgage against Muhammad Husain, the heirs of Dhuman Khan, and certain transferees of portions of the mortgaged property, and in due course obtained a decree for sale. In execution of this decree one of the houses belonging to Dhuman Khan was put up to auction and was purchased by one Rahmat-ul-lah. After this sale a brother and a sister of Dhuman Khan, who had unsuccessfully objected to the sale, filed suits against the auction purchaser and succeeded in establishing their title to portions of the house amounting to rather more than two-thirds of it. Thereupon the present suit was brought by the auction purchaser against the mortgagee and the representatives of the mortgagors, in which he claimed either the sum of Rs. 1,000 from the mortgagee or that the same sum should be contributed rateably according to their interests in the mortgaged property by the other defendants. The Court of first instance (Munsif of Allahabad) dismissed the suit as against the mortgagee, but gave the plaintiff a decree for contribution against the representatives of the mortgagors. On appeal by one of the defendants the lower appellate Court (Subordinate Judge of Allahabad) reversed the decree of the first Court and dismissed the suit in its entirety. The plaintiff accordingly appealed to the High Court.

Maulvi *Rahmat-ul-lah* and Babu *Durga Charan Banerji*, for the appellants.

Mr. *Muhammad Raoof*, for the respondent.

STANLEY, C.J., and BANERJI, J.—We are of opinion that the judgment of the learned Subordinate Judge on the questions

1905

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MUHAMMAD  
RAHMAT-  
UL-LAH  
v.  
BACHCHO.

discussed before us was perfectly correct, and that there is no force in this appeal. We also think that the reasons which he has assigned for the judgment are sound and that the appellant here was not entitled to maintain a suit for contribution. He purchased at a Court sale property consisting of a house, without, admittedly, any warranty of title. Subsequently it turned out that two parties claimed to be entitled to about two-third shares in the house. They brought suits to have their title established and their suits were decreed. From this it would seem that the appellant purchased property the title to two-third shares of which was defective. As has been laid down in the judgment in the case of *Shanto Chandar Mukerji v. Nain Sukh* (1) to which one of us was a party, "the purchaser must be taken to buy the property, with all risks and all defects in the judgment-debtor's title, except, as provided by sections 313 and 315, that in the absence of fraud his only remedy is to recover back his purchase money, where it is found that the judgment-debtor had no saleable interest in the property at all, and that he cannot by suit, any more than by application, obtain a refund in proportion to the extent to which the judgment-debtor had no interest." The judgment-debtor in this case had admittedly an interest in the house, the subject-matter of the sale, and therefore sections 313 and 315 do not apply. Under the circumstances the rule of *caveat emptor* seems to apply. The case may be one of hardship, but we are unable to say that it is so, because it is quite possible and consistent with all that we know that the house was sold to the appellant at a less price than would have been paid if the title had been known to be good. The fact that the appellant has been deprived of a portion of the property which he purchased does not in our opinion entitle him to contribution against the owners of the other portions of the property which were subject to the mortgage under which the property was sold to him. We therefore dismiss the appeal with costs on the higher scale.

*Appeal dismissed.*

(1) (1901) I. L. R., 23 All., 355.

1905

February 25.*Before Mr. Justice Aikman.*

SUKH LAL (PLAINTIFF) v. MADHURI PRASAD (DEFENDANT).\*

*Pre-emption—Sale fraudulently disguised as a gift—Suit for pre-emption alleging date on which fraud became known to plaintiff—Limitation—Act No. XV of 1877 (Indian Limitation Act), section 18, schedule II, articles 10 and 120—Burden of proof.*

On the 11th of September 1901, G. executed in favour of M. what purported to be a deed of gift of certain property. M., after an unsuccessful attempt to obtain mutation of names, filed a suit in the Civil Court for a declaration that the transaction was a gift and for possession of the property, but stated that he was willing to pay the balance of the consideration money if the transaction was found to be a sale. On the 12th of December 1902 a consent decree was passed whereby the deed of gift was declared lawful (*jaiz*), and possession was decreed in favour of M. On the 5th of February 1903, S. brought a suit for pre-emption against G. and M., alleging that the transaction was a sale fraudulently disguised as a gift, and that the fraud had come to his knowledge on the 14th of December 1902. *Held* that the suit was within time. It lay on the defendant to show that the plaintiff had knowledge of the fraud practised on him at a time which was too remote to allow him to bring the suit, and this he had failed to do. *Rahimbhoy Habibhoy v. Turner* (1) referred to.

THE facts out of which this appeal arose were as follows:—

On the 11th September 1901, one Ganga Prasad executed in favour of the respondent Madhuri Prasad a document which purported to be a deed of gift of certain property. When application was made to the Revenue Court for mutation of names, Ganga Prasad objected on the ground that he had not received the balance of the consideration for the property. The Assistant Collector refused the application, and an appeal by Madhuri Prasad was dismissed by the Collector. Thereupon Madhuri Prasad filed a suit in the Civil Court for a declaration that the transaction was a gift and for possession of the property, but in his plaint expressed his willingness to pay the sum of Rs. 105, the alleged balance of the consideration, should it be found that the transaction was really a sale and not a gift. On the 12th of December 1902, a decree was passed by consent whereby the deed of gift was declared to be lawful (*jaiz*), and it was ordered that Madhuri Prasad was to get possession of the

\* Second Appeal No. 751 of 1903 from a decree of Mr. Azizulrahman, Subordinate Judge of Mainpuri, dated the 13th of July 1903, reversing a decree of Maulvi Muhammad Husain, Munsif of Etawah, dated the 20th of April 1903.



1905

SUKH LAL  
v.  
MADHURI  
PRASAD.

property within four days, the parties paying their own costs. On the 5th February 1903, one Sukh Lal brought a suit for pre-emption of the property the subject of the alleged deed of gift. In his plaint he alleged that the defendants, Ganga Prasad and Madhuri Prasad, had fraudulently and in concert got a deed of gift executed instead of a sale-deed in order to defeat the right of the plaintiff as pre-emptor. The plaintiff further stated that the fraud was discovered on the 14th December 1902, on which date he tendered to the defendants the sum of Rs. 200 as the price of the property and claimed it by right of pre-emption, but this offer was refused. Ganga Prasad did not defend the suit. In his written statement Madhuri Prasad pleaded that no sale-deed had been executed in respect of the property in dispute, but that it was a deed of gift; he denied that any deception had been practised. The Courts below have concurred in finding that the deed was in reality a sale-deed and was fraudulently executed as a deed of gift to defeat the plaintiff's right of pre-emption. The Court of first instance (Munsif of Etawah) gave the plaintiff a decree. In appeal Madhuri Prasad impugned the finding of the Court of first instance as to the transaction being one of sale, and asserted that the deed was a deed of gift: he also pleaded that the suit was barred, and that if section 18 of the Limitation Act were considered applicable to the case, the plaintiff had not proved that he acquired knowledge of the fraud on the 14th December 1902. The lower appellate Court (Subordinate Judge of Mainpuri), whilst holding that the defendants had committed a fraud on the plaintiff, came to the conclusion that the suit was barred by limitation, and accordingly, reversing the decree of the Munsif, dismissed the plaintiff's suit. The plaintiff thereupon appealed to the High Court.

Babu Satya Chandra Mukerji (for whom Babu Parbati Charan Chatterji), for the appellant.

Dr. Satish Chandra Banerji and Pandit Baldeo Ram Dave, for the respondent.

AIKMAN, J.—This appeal arises out of a suit brought by the plaintiff, who is appellant here, to enforce a right of pre-emption. On the 11th September 1901 one Ganga Prasad

1905

SUKH LAL  
v.  
MADHURI  
PRASAD.

executed in favour of the respondent Madhuri Prasad a document which purported to be a deed of gift of the property in suit. When application was made to the Revenue Court for mutation of names, Ganga Prasad objected on the ground that he had not received the balance of the consideration for the property. The Assistant Collector refused the application, and an appeal by Madhuri Prasad was dismissed by the Collector. Thereupon Madhuri Prasad filed a suit in the Civil Court for a declaration that the transaction was a gift and for possession of the property, but in his plaint he expressed his willingness to pay the sum of Rs. 105, the alleged balance of the consideration, should it be found that the transaction was really a sale and not a gift. On the 12th of December 1902 a decree was passed by consent whereby the deed of gift was declared to be lawful (*jais*), and it was ordered that Madhuri Prasad was to get possession of the property within four days, the parties paying their own costs.

On the 5th February 1903 the plaintiff brought the suit out of which this appeal arises. In his plaint he alleged that the defendants, Ganga Prasad and Madhuri Prasad, had fraudulently and in concert got a deed of gift executed instead of a sale-deed in order to defeat the right of the plaintiff as pre-emptor. The plaintiff further stated that the fraud was discovered on the 14th December 1902, on which date he demanded of the defendants the sum of Rs. 200 as the price of the property and claimed it by right of pre-emption, but this offer was refused. Ganga Prasad did not defend the suit. In his written statement Madhuri Prasad pleaded that no sale-deed was executed in respect of the property in dispute, but that it was a deed of gift; he denied that any deception had been practised. The Courts below have concurred in finding that the deed was in reality a sale-deed and was fraudulently executed as a deed of gift to defeat the plaintiff's right of pre-emption. The Court of first instance gave the plaintiff a decree. In appeal Madhuri Prasad impugned the finding of the Court of first instance as to the transaction being one of sale, and asserted that the deed was a deed of gift: he also pleaded that the suit was barred, and that if section 18

1905

SUKH LAL

v.

MADHURI  
PRASAD.

of the Limitation Act were considered applicable to the case, the plaintiff had not proved that he acquired knowledge of the fraud on the 14th December 1902. The learned Subordinate Judge, whilst holding that the defendants had committed a fraud on the plaintiff, came to the conclusion that the suit was barred by limitation. It does not appear whether the property in dispute admitted of physical possession. If it did, the suit was clearly within time, for it is evident that on the date of the compromise decree, *i.e.*, the 12th of December 1902, Madhuri Prasad had not got possession of the property. If the property did not admit of physical possession, the question arises whether the suit is barred by the second provision in the third column of article 10 of the second schedule of the Limitation Act, which fixes the time from which limitation begins to run as the date "when the instrument of sale is registered." In my opinion this refers to an instrument which is, not only in reality, but in terms, an instrument of sale. The instrument in the present case was certainly on the face of it not an instrument of sale. I am of opinion, therefore, that the second provision in the article is not applicable to this case, and would hold that if this suit was not in time counting from the date from which possession of the property was taken, it was in time within article 120 of the second schedule. I would further point out that the learned Subordinate Judge has treated the case as if the onus lay upon the plaintiff to show that his suit was within time. I think in this he is mistaken. In the case *Rahimbhoy Habibbhoy v. Les Agnew Turner* (1) the judgment of the Privy Council is:—"Their Lordships consider that when a man has committed a fraud and has got property thereby, it is for him to show that the person injured by this fraud and suing for the property has had clear and definite knowledge of those facts which constitute the fraud at a time which is too remote to allow him to bring the suit." It was for the defendants therefore in the present case to show affirmatively that the plaintiff's suit was too late. The learned vakil for the respondent has not been able to refer me to any evidence of "clear

(1) (1892) I. L. R., 17 Bom., 341, at p. 347.

1905

SUKH LAL

v.

MADHURI  
PRASAD.

and definite knowledge" on the plaintiff's part of the fraud perpetrated upon him. In fact, looking to the case set up by the defendants and all along maintained by them, namely, that the transaction was one of gift and not of sale, it would have been surprising had any such evidence been forthcoming. For the above reasons I allow the appeal with costs, and, setting aside the decree of the lower appellate Court with costs, I restore that of the Court of first instance.

*Appeal decreed.*

## FULL BENCH.

1905  
February 23.

*Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Sir William Burdett and Mr. Justice Aikman.*

MANPAL (PLAINTIFF) v. SAHIB RAM AND OTHERS (DEFENDANTS).\*

*Pre-emption—Re-sale of property claimed by pre-emptor—Second purchaser impleaded in pre-emptor's suit and issues determined as to his rights—Lis pendens—Estoppel.*

After the filing of a suit for pre-emption but before service of summonses the heirs of the vendee re-sold the property claimed. The plaintiff impleaded the new vendee in his suit and amended his plaint, raising fresh issues as against the defendant so added, and the added defendant also filed a written statement. The issues raised between the plaintiff and the added defendant were heard and ultimately decided in favour of the defendant. *Held* that the plaintiff could not, after himself causing the second vendee to be added as a party and issues to be decided as to his rights, still plead in defence of the claim put forward by that defendant, the doctrine of *lis pendens*.

*Singh v. Tarnat Singh* (1) distinguished.

The plaintiff in this case instituted a suit on the 23rd of September 1901, to pre-empt a sale made by one Hari Singh in favour of Birbal. Before the service of summonses in that suit the plaintiff sold the property to one Sahib Ram on the 3rd of October 1901. On the 25th of January 1902 the plaintiff, with the leave of the Court, amended his plaint and added Sahib Ram as a defendant and inserted in the body of the plaint two

\* Second Appeal No. 246 of 1903 from a decree of W. P. Wells, Esq., District Judge of Agra, dated the 9th of December 1902 modifying a decree of Munshi Raj Nath Prasad, Subordinate Judge of Agra, dated the 29th of July 1902.

paragraphs, in which he impeached the sale made to Sahib Ram as being collusive and also set up his right of pre-emption as against Sahib Ram. Thereupon Sahib Ram filed a written statement, and pleaded that he had a preferential right of pre-emption, that he had in fact pre-empted, and that the sale to him was a genuine sale. Issues were framed upon these matters. The Court of first instance (Subordinate Judge of Agra) did not entertain the question of the preferential claim set up by Sahib Ram, but came to the conclusion that having regard to the provisions of section 52 of the Transfer of Property Act, the plaintiff's right to pre-empt was not defeated by the sale to Sahib Ram. On appeal the District Judge considered the question of preferential right and came to the conclusion that Sahib Ram had a preferential right to pre-empt, and accordingly allowed the appeal and dismissed the plaintiff's suit. The plaintiff appealed to the High Court. The appeal first came for hearing before a Division Bench, by whom an issue was remitted to the lower appellate Court as to whether the sale-deed in favour of Sahib Ram was merely a colourable and fictitious document or the outcome of a real sale. The finding on remand was that the sale to Sahib Ram was not a fictitious but a real transaction. After the return of this finding the appeal was, by order of the Chief Justice, laid before a Full Bench.

Dr. Tej Bahadur Sapru (for the Hon'ble Pandit Madan Mohan Malaviya) for the appellant contended that the re-sale Sahib Ram was bad, inasmuch as he had purchased *pendente li*. This contention was based upon the position that a suit becomes contentious as soon as the plaint was filed irrespective of the service of summons in the suit. A long and learned argument was addressed to the Court in support of this contention. But the Court considered that under the circumstances presented in the case the question of *lis pendens* did not arise at all.

The Hon'ble Pandit Sundar Lal (with whom Mr. Baldeo Ram Dave) for the respondents, after replying to the question of *lis pendens*, taking up the position that it does not become "contentious" within the meaning of section 52 of the Transfer of Property Act, 1882, until the defendant has entered an appearance, further submitted that the question of

1905

MANPAL

v.  
SAHIB RAM.

1905

MANPAL  
v.  
SAHIB RAM.

*lis pendens* did not really arise in this case. The plaintiff himself had impleaded the respondent as a defendant in the suit and claimed a preferential right of pre-emption against him. This right he was bound to establish. The object of a suit for pre-emption was to exclude strangers, and this object would be defeated if a person having an inferior right were to bring a suit and obtain a decree against a stranger even though the latter might have re-transferred the property during the pendency of the suit to a person having a higher right. Section 52 is to be applied, if at all, very strictly.

Dr. *Tej Bahadur Sapru* in reply to the second branch of the argument for the respondent referred to *Narain Singh v. Parbat Singh* (1) and submitted that the cases in Allahabad concurred in laying down that a suit could not be maintained if the property before suit were re-transferred to a co-sharer. When the cause of action was put into Court it could not be defeated by any subsequent action of the parties.

STANLEY, C.J., and BLAIR, BANERJI, BURKITT and ALKMAN, JJ.—This appeal was referred to a Full Bench by two of us on the representation that it involved the determination of the vexed question of the true construction of section 52 of the Transfer of Property Act. At the close of a lengthy argument Pandit *Sundar Lal*, on behalf of the respondent, raised a point which appears to us to be fatal to the appeal, and it is not necessary, having regard to the view which we take upon that point to determine the main question, which has been discussed at very great length. The suit was instituted on the 29th of September 1901 to pre-empt a sale made by one Hari Ram in favour of one Birbal, whose heirs are the defendants 1 and 2. In the service of the summons in that suit Birbal's property to one Sahib Ram on the 3rd of October 1901. On the 11th of October 1901 the Court made a decision as to the application of section 52 at once in relation to this sale; but on the 25th of January 1902 the respondent filed his plaint by the leave of the Court, and impleaded Sahib Ram as a defendant, and inserted in the body of the plaint two paragraphs in which he impeached the sale made to Sahib Ram as being collusive and also set up his right of

(1) (1901) I. L. R., 23 All., 247.



1905

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MANPAL  
v.  
SAHIB RAM.

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pre-emption as against Sahib Ram. Thereupon Sahib Ram filed a written statement, and in it he distinctly raised the question which has been determined by the learned District Judge, namely, that he (Sahib Ram) had a preferential right to pre-empt: that he had so pre-empted, and that the sale to him was a genuine sale. Issues were joined upon these matters. The Court of first instance did not entertain the question of the preferential claim set up by Sahib Ram, but came to the conclusion that, having regard to the provisions of section 52 of the Transfer of Property Act, the plaintiff's right to pre-empt was not defeated by the sale to Sahib Ram. On appeal the learned District Judge considered the question of preferential right and came to the conclusion that Sahib Ram had a preferential right to pre-empt; and, this being so, he allowed the appeal, set aside the decree of the Court below, and dismissed the plaintiff's suit.

Now in view of the finding of the Court below that Sahib Ram has a preferential right of pre-emption, it appears to us that this appeal must fail. The plaintiff elected to amend his plaint and to raise the question as to Sahib Ram's rights. This question has been determined, and the plaintiff cannot complain of the course adopted by the Court on his own invitation. If he wished to rely on section 52 alone, he was ill-advised in amending his plaint as he did. As matters stand, the rights of the parties having been fully investigated and determined, the plaintiff cannot in our opinion now give the go-by to the decision which has been passed, and which he himself invited, and fall back on section 52. It is unnecessary in this view of the case to consider the difficult question which arises on the construction of section 52, and we abstain from forming an opinion upon that question.

The learned vakil for the appellant called our attention to the decision of one of us in the case of *Narain Singh* (1) as an authority for the proposition that a plaintiff having added Sahib Ram as a defendant to the suit, cannot disentitle his client to maintain the suit for pre-emption. The case, however, although the person to whom the property had been a second time sold was made a party, on examination

1905

MANPAL  
v.  
SAHIB RAM.

the pleadings we find that there was no amendment or alteration in the body of the plaint itself. It was not in the plaint alleged, nor was it contended, that the sale to the defendant who was added was a collusive sale, nor was it alleged that the plaintiff had a preferential right as against the defendant so added. This may differentiate the two cases. We are clearly of opinion that in a case such as the present, the circumstances being as we have described, a defendant having been added who had at the time a right to maintain a suit for pre-emption based upon his preferential claim, and the question of preferential claim having been determined in the suit, it does not lie in the mouth of the plaintiff to object to the finding upon the issue raised at his invitation and to say that the Court is to disregard it. The sale to Sahib Ram has been found by the Court below to be a genuine sale. It has been also found by the Court below that Sahib Ram had a preferential right to pre-empt; and it is also the case that Sahib Ram is in possession of the property. Under these circumstances there was no alternative left to the Court but to dismiss the appeal.

We have also to consider an objection which has been filed on behalf of the respondent on the question of costs. We have considered that question and we have come to the conclusion the decision of the Court below must be modified to some extent. The Court below has awarded the plaintiff the costs of the suit. That order does not seem to us to meet the requirements of justice, but we think, having regard to all the circumstances of the case, that the plaintiff had a cause of action when he brought the suit, and also to the fact that the main question before the parties came to the Court was the construction of the proper order to make is that each party do abide by the decision of all Courts. We so direct.

*Appeal dismissed.*

## APPELLATE CIVIL.

1905  
March 2.*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice  
Sir William Burkitt.*MARDAN SINGH AND OTHERS (DEFENDANTS) v. THAKUR SHEO DAYAL  
(PLAINTIFF). \**Act No. IV of 1882 (Transfer of Property Act), section 82—Mortgage—  
Contribution—Valuation of properties for the purpose of ascertaining  
their liability to contribution.*

In estimating—for the purpose of giving effect to a claim for contribution—the respective values of two or more properties, the subject of a mortgage, the time to be regarded is the date of the execution of the mortgage in virtue of which contribution is claimed.

THE facts of this case are as follows :—

On the 20th of July 1892 Mardan Singh and Ranjit Singh mortgaged two villages called Domanpur and Puranpur by way of conditional sale to Chet Singh. On the 20th of September 1899 one Sheo Dayal Singh, who had obtained a simple money decree against the mortgagors, in execution of that decree caused a two-third share of Puranpur to be sold and purchased it himself. Subsequently the mortgagee Chet Singh brought a suit for foreclosure, and on the 6th of June 1901 a decree *nisi* was passed. In order to protect the property, Sheo Dayal Singh, on the 30th of September 1901, deposited in court a sum of Rs. 8,392-6-6, and thereby satisfied the decree and discharged the mortgage debt in full. On the 1st of October 1901 Sheo Dayal Singh filed the present suit to recover contribution from Domanpur and the one-third share of Puranpur which he had not purchased. As to Domanpur it was proved that the value of the village had been considerably increased since the execution of Chet Singh's mortgage owing to an increase in the Government revenue payable thereon, which was accompanied by a corresponding reduction in the value of the village. The question therefore arose as to the point of time at which the village ought to be valued for the purpose of ascertaining the amount which it was liable to contribute to the mortgage debt. The lower appellate Court (Subordinate Judge) held that the time to be looked at was

\* First Appeal No. 80 of 1903, from a decree of Mr. Mukerji, Subordinate Judge of Cawnpore, dated the 13th of December 1901.

1905

MARDAN  
SINGH  
v.  
THAKUR  
SHEO DAYAL.

plaintiff's purchase of the two-third share in Puranpur, and passed a decree accordingly. Against this decree the defendants appealed, urging that the apportionment for the purposes of contribution should be made on the value of the mortgaged properties at the date of the mortgage.

The Hon'ble Pandit *Sundar Lal*, for the appellants.

Babu *Jogindro Nath Chaudhri* and Pandit *Moti Lal Nehru*, for the respondent.

STANLEY, C.J., and BURKITT, J.—An interesting question upon the meaning of section 82 of the Transfer of Property Act is raised by this appeal. The facts are few and simple. They are as follows. On the 20th of July 1892, Mardan Singh and Ranjit Singh mortgaged two villages called Domanpur and Puranpur by way of conditional sale in favour of Chet Singh. On the 20th of September 1899, the plaintiff Sheo Dayal Singh, who had obtained a simple money decree against the mortgagors, in execution of that decree caused a two-third share of Puranpur to be sold, and himself purchased that share. This purchase was of course, subject to the mortgage of the 20th of July 1892. Subsequently the mortgagee brought a suit for foreclosure, on the 6th of June 1901 a decree *prosi* was passed. In order to protect the property the plaintiff on the 30th of September deposited in Court a sum of Rs. 8,392-6-6 and thereby obtained the decree and discharged the mortgage debt in full. The defendant then instituted the suit out of which this appeal has resulted.

The question before the Court is the question of the time at which the value of the villages comprised in the mortgage are to be ascertained for the purpose of contribution. It appears that at the time of the mortgage the revenue of Domanpur was Rs. 1,353 and that of Puranpur was only Rs. 1,803, consequently the value of the property at that time only amounted to Rs. 450. This value was afterwards reduced to Rs. 370, but the value of the property now appears to have fallen to Rs. 1,560, and that of Domanpur to Rs. 790. The plaintiff claimed contribution according to the values of the property at the time of the mortgage, and to his contention the Subordinate Judge has acceded.

1905

MARDAN  
SINGH

v.

THAKUR  
SHRO DAYAL.

The appellant has filed the present appeal on the ground that the valuation of the two villages ought to be taken as at the date of the mortgage for the purposes of contribution under section 82 of the Transfer of Property Act. This section provides that "where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage." Now ordinarily the time at which the value is taken would not be of much importance because the fluctuation in the value of several properties would generally be about equal. In this case, however, it is apparent, having regard to the fact that the Government revenue in the case of Domanpur was largely reduced after the date of the mortgage, that the question becomes a material one. It appears to me that the time at which the valuation ought to be made for the purposes of contribution is the date of the mortgage, and for these reasons. The section itself seems to contemplate that properties are to be liable to contribute rateably according to their values at the date of the mortgage and not at a future date, because the present tense is used throughout. The words of the section are that the "properties are liable," not "shall be liable" at any future time, and it also provides that in calculating the value of the property amount of any other incumbrance to which any property is subject at the date of the mortgage is to be deducted from the value of such property. If any other date than the date of the mortgage was to be taken as the time at which the properties were to be valued for the purpose of contribution, it would follow that a party who, being the owner of the mortgaged property, had expended money in improving his property, would thereby be required to pay a larger contribution by reason of the increased value of his property. This is inequitable. It has been suggested that other dates might be selected, such as the time of foreclosure, at which the respective values; but it seems to me that the date w...

1905

MARDAN  
SINGH

v.

THAKUR  
SHEO DAYAL.

Legislature had in contemplation when section 82 was enacted is the date of the execution of the mortgage, which is the date upon which the equity to contribution arises. The parties at that time, we think, became liable to contribute *inter se* rateably in accordance with the respective values of the properties. We can find no argument in favour of the view that the date of the plaintiff's purchase was the proper time at which the valuation should be made. The plaintiff when he purchased only stepped into the shoes of the mortgagor in respect of the property so purchased. If different parts of mortgaged property be sold at different dates it would clearly not be proper to choose the date of any one sale in preference to the date of any other sale as the proper time for the making of the valuation. We therefore think that the learned Subordinate Judge was in error in fixing the date of the plaintiff's purchase as the time at which the properties should be valued for the purpose of contribution. We must therefore allow the appeal; but before we can finally dispose of this case we must remand to the learned Subordinate Judge two issues for determination under the provisions of section 366 of the Code of Civil Procedure, namely, "what are the respective values of Domanpur and Puranpur at the date of the execution of the mortgage of the 20th of July 1897; and, having regard to these valuations, what is the amount of contribution which the defendants appellants are to pay in respect of the village of Domanpur and one-half of Puranpur?" The Court will admit any proper evidence which may be tendered for the determination of these issues. On return of the findings ten days will be allowed for the parties to file their objections.

*Case remanded.*

Before Mr. Justice Banerji.

RAM DIN (PLAINTIFF) v. POKHAR SINGH (DEFENDANT).\*

1905  
March 2.

*Pre-emption—Wajib-ul-arz—Interpretation of document.*

A claim for pre-emption was put forward on the basis of a wajib-ul-arz, the material clause of which ran as follows:—"Up to now there has been no suit for pre-emption, but we accept the right of pre-emption." The previous wajib-ul-arz of the village, of date some 22 years earlier, contained this provision as to the right of pre-emption:—"If a co-sharer is desirous of transferring his share, he shall transfer it, first, to his near relative, and next to co-sharers in the village, and on their refusal he may mortgage or sell it to anyone he likes." *Held* on a construction of these two documents that they amounted to a record of a custom of pre-emption as prevailing in the village; also that a near relative need not also be a co-sharer; the two were distinct classes of pre-emptors, the near relative having the prior claim. *Abdul Wahid v. Wilayat Husain* (1) referred to.

IN this case one Pokhar Singh obtained a decree for foreclosure and an order absolute for foreclosure against one Musammat Janki. Thereupon one Ram Din claiming to be the son of a sister of Musammat Janki sued for pre-emption of the property comprised in the decree, basing his claim upon the terms of a wajib-ul-arz of 1864, which provided that "if a co-sharer is desirous of transferring his share, he shall transfer it, first, to his near relative, and next to co-sharers in the village and on their refusal he may mortgage or sell it to anyone he likes." The Court of first instance (Munsif of Orai) dismissed the plaintiff's suit, being of opinion that the wajib-ul-arz had been superseded by a later wajib-ul-arz prepared and that under the later wajib-ul-arz the right conferred by the right of pre-emption according to the Muhammadan terms of that wajib-ul-arz were as follows:—"There has been no suit for pre-emption, but we accept pre-emption." That Court also found that the plaintiff failed to prove that he was sister's son of Musammat Janki. On appeal by the plaintiff the lower appellate Court (District Judge of Jhansi) found that the plaintiff was the son of a sister of Musammat Janki; also that the wajib-ul-arz of 1864 which was accepted by the co-sharers

\* Second Appeal No. 899 of 1903, from Pande, District Judge of Jhansi, dated the 1st of March 1903, decree of Munshi Ganga Prasad, Munsif of Jhansi.



1905

RAM DIN  
v.  
POKHAI  
SINGH.

of 1886 was prepared. But it further found that under this custom it was necessary that the plaintiff, as well as being a near relative, should also be a co-sharer, and therefore confirmed the decree of the Munsif. The plaintiff thereupon appealed to the High Court.

Munshi *Jang Bahadur Lal*, for the appellant.

The Hon'ble Pandit *Madan Mohan Malaviya* (for whom Pandit *Mohan Lal Nehru*), for the respondent.

BANERJI, J.—The respondent having obtained a decree for foreclosure and an order absolute for foreclosure, the suit out of which this appeal arises was brought by the plaintiff appellant to enforce his right of pre-emption in respect of the property comprised in the decree. He claimed to have priority over the defendant on the ground that he was a near relative of the vendor. He relied upon the *wajib-ul-arz* of 1864, which provides that "if a co-sharer is desirous of transferring his share, he shall transfer it, first, to his near relative, and next to co-sharers in the village, and on their refusal he may mortgage or sell it to anyone he likes." It has been found that the plaintiff is the son of a sister of Musammam Janki, against whom the decree for foreclosure was obtained. As a near relative the plaintiff claims the property. The Court at first instance dismissed the suit, being of opinion that the *wajib-ul-arz* of 1864 had been superseded by the *wajib-ul-arz* of 1886, and that under the latter *wajib-ul-arz* the plaintiff was entitled to the right of pre-emption under the Muhammadan law. It also held that the plaintiff had failed to show that he was a near relative of the vendor. The lower court, as I have said, that the plaintiff is a near relative was also of opinion that the *wajib-ul-arz* of 1864 was the custom, and that under the subsequent *wajib-ul-arz* the co-sharers agreed to accept the custom of the preparation of that *wajib-ul-arz*. That Court was, however, of opinion that the plaintiff could not pre-empt unless he was also a co-sharer, as the plaintiff was not a co-sharer he had no right of pre-emption. On this ground the lower appellate court reversed the decree of the first court, dismissing the

1905

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 RAM DIN  
 v.  
 POKHAR  
 SINGH.

plaintiff's suit. It is contended on behalf of the respondent that the *wajib-ul-arz* of 1886 does not record a custom of pre-emption and that the rule, which under that *wajib-ul-arz* will govern pre-emption, is the rule of Muhammadan Law. The *wajib-ul-arz* of 1886 is in the following terms:—"Up to now there has been no suit for pre-emption, but we accept the right of pre-emption." This no doubt is the record of a contract. But it is said that as it lays down no specific rule of pre-emption by which the co-sharers agreed to be bound, the ordinary rule of Muhammadan Law must be applied. I do not agree with this contention. There can be no doubt that the *wajib-ul-arz* of 1864 contains the record of a custom. It is certainly not clear that it is the record of a contract, and it must therefore be held, according to the rulings of this Court, that the *wajib-ul-arz* contains the record of a custom. When the subsequent *wajib-ul-arz* of 1886 was prepared the custom recorded in 1864 had not been abrogated, although no suit for pre-emption had been brought. Therefore when the co-sharers agreed in 1886 to accept the rule of pre-emption, they clearly agreed to be bound by the rule which at that time prevailed, *viz.*, the custom recorded in the *wajib-ul-arz* of 1864. On this point the Court below has come to a right conclusion. The learned Judge, however, thinks that under the *wajib-ul-arz* of 1864 no one can claim pre-emption unless he is a co-sharer in the village. This construction is not justified by reading into the *wajib-ul-arz* words which do not appear in it. Under that document the first class are near relatives without a right of pre-emption, the second class are co-sharers. If the intention had been that pre-emption must also be co-sharers, nothing could have been so easily inserted. The *wajib-ul-arz* is worded it is only near relatives who come under the rule of the first class. This case is very similar to *Wahid v. Wilayat Husain* (1). In that case which contained a similar clause, was

1905

RAM DIN  
v.  
POKHAR  
SINGH.

way in which in my opinion the wajib-ul-arz in this case should be construed. If therefore the plaintiff is a near relative of the vendor he comes under the category of pre-emptors of the first class and is entitled to maintain this suit. As he is the sister's son of the vendor, there can be no doubt that he is a near relative of the vendor, and consequently he has the right to pre-empt the property in suit. There is no other question involved in the appeal. The result is that the plaintiff's suit must be decreed. I accordingly allow the appeal, and, setting aside the decrees of the Court below, make a decree in favour of the plaintiff with costs in all Courts on condition that the plaintiff do pay the pre-emption money, *viz.*, Rs. 504-7-0, within two months from this date. In default of payment the suit will stand dismissed with costs in all Courts.

*Appeal decreed.*

1905

March 7.

*Before Sir John Stanley, Knight, Chief Justice, and*

*Mr. Justice Banerji.*

BHAJAN LAL (DEFENDANT) v. MUHAMMAD ABDUS SAMAD KHAN  
(PLAINTIFF).\*

*From—Landholder and tenant—Rights of landholder in the abadi—Transfer of house site by tenant.*

Apart from any custom recorded in the wajib-ul-arz forbidding a tenant transfer the site of a house occupied by him in the abadi, a tenant has not, in the absence of a special custom or contract giving him such a right, any right to transfer the site of his house in the abadi.

There was a suit brought by the plaintiff as zamindar to eject the defendants, whom he alleged to be his tenants in respect of a portion of the abadi of mauza Malagarh. In his plaint he alleged that a house had belonged originally to one Baldeo, a resident of the village some years previously; that Baldeo's son, and the land, the site of the house, being leased by the plaintiff to the defendants, Bhajan Lal. Subsequently Bhajan Lal had transferred the house from Boshan, the son of Baldeo,

\*O. 130 of 1903, from a decree of Maulvi Maula Bakhsh, District Judge of Aligarh, dated the 22nd of January 1903, and the order of Babu Hira Lal Singh, Munsif of Bulandshahr, dated the 12th of February 1902.

and denied the plaintiff's right as lessor. The plaintiff prayed that if the defendants 1 and 2 admitted themselves to be plaintiff's lessees they might be ejected on payment by the plaintiff of the cost of certain building materials belonging to them, or, in the alternative, if the said defendants did not admit the tenancy, then the plaintiff might be put into possession by virtue of his rights as zamindar, without compensating the defendants. The Court of first instance (Munsif of Bulandshahr) dismissed the suit. On the plaintiff's appeal the lower appellate Court (Additional Subordinate Judge of Aligarh) found the plaintiff's allegations as to a lease to be untrue, but that, the plaintiff being the zamindar, the transfer by Roshan to the other defendants could not pass the site of the house except by special custom, which had not been proved, and accordingly gave the plaintiff a decree based on his rights as zamindar, allowing the defendants a certain time within which to remove the materials of the house. Against this decree Bhajan Lal appealed to the High Court.

Babu *Sital Prasad Ghose* and Babu *Devendro Nath Ohdedar*, for the appellant.

Mr. W. K. Porter and Maulvi *Ghulam Mujtaba*, for the respondent.

STANLEY, C.J., and BANERJI, J.—The plaintiff as zamindar of the village brought the suit which has given rise to this appeal for the ejectment of the defendant from a piece of land upon which exists a dwelling house now in the occupation of the defendant. The plaintiff's case, as set forth in the pleadings, was that the land had been originally occupied by a person who abandoned the village about 15 years ago, and the house fell into ruins, and that the site reverted to the plaintiff. He alleged that in 1897 he had let the land to the defendant on certain conditions, of which the defendant did not comply, and on that ground the plaintiff sued to eject the defendant from the land, offering to pay him compensation for the materials which existed on it. In the alternative he prayed that if the defendant denied that he was a tenant he be ejected from the land without compensation. The lower appellate Court has found the plaintiff's alleg-

1905

BHAJAN LAL

v.

MUHAMMAD

ABDUS

SAMAD

KHAN.

1905

BHAJAN LAL

v.

MUHAMMAD  
ABDUS  
SAMAD  
KHAN.

the abandonment of the village by Baldeo and as to the letting of the land by the plaintiff to the defendant to be untrue. It appears that Baldeo's son Roshan sold the building to the defendant, and that it is by virtue of this sale that the defendant is in possession. The lower appellate Court has held that, it being admitted that the plaintiff is the owner of the land, Roshan had no transferable interest in it otherwise than by custom, that such custom had not been established, and that consequently the plaintiff was entitled to eject the defendant, the latter having only the right to remove the building materials. We think the Court below was right. The land being admittedly the property of the plaintiff, Baldeo, or his son Roshan, had no transferable interest in it except by contract or custom. No contract is alleged in this case, and according to the finding of the Court below no custom has been established. Apart therefore from the custom recorded in the *wajib-ul-arz* which forbids a tenant to sell the site of his house, Roshan had not, under the ordinary law and in the absence of a custom giving to a tenant a transferable right in the land held by him, any right to convey the disputed land to the defendants. Consequently the Court below justified in making the decree which it passed in favour of plaintiff. The learned *vakil* for the appellant wished to raise the question of equitable acquiescence on the part of the defendant. As no such question was raised in the Court below we do not allow him to raise it for the first time in second appeal. We accordingly dismiss the appeal with costs. We order the defendant to pay for removal of the building materials by six months date.

*Appeal dismissed.*

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*  
BHAWANI PRASAD AND OTHERS (PLAINTIFFS) v. KUTUB-UN-NISSA  
BIBI AND OTHERS (DEFENDANTS).\*

1905  
March 7.

*Act No. VII of 1870 (Court Fees Act), section 11, schedule II, article 17 (vi)—Court fee—Suit for sale on a mortgage—Appeal—Claim for future interest.*

The plaintiffs, in whose favour a decree for sale on a mortgage had been passed allowing interest up to the date fixed by the decree for payment of the mortgage money, appealed on the ground that interest should have been allowed up to the date of realization. *Held* that the proper court fee payable on the memorandum of appeal was ten rupees, as provided by article 17 (vi) of the second schedule to the Court Fees Act, 1870. *Krishnarav v. Antaji Virupuksha* (1) followed.

THE plaintiffs, appellants in this case, brought their suit to recover the amount due upon a mortgage by sale of the mortgaged property. The Court of first instance gave them a decree, awarding future interest up to the date fixed by the decree for payment. The plaintiffs objected to the limit fixed by the decree of the lower Court in regard to the time up to which interest should be calculated, and filed an appeal in respect of interest from the date fixed by the decree for payment up to the date of realization. As this amount could not be calculated at the time when the appeal was filed, the appellants paid a court fee of ten rupees on their memorandum of appeal according to article 17 (vi) of the second schedule to the Court Fees Act, 1870. The plaintiffs succeeded in their appeal, and a sum of Rs. 47,400 odd was awarded to them by way of future interest. On this the following report was submitted by office of the Court to the Bench which heard the appeal:—

“This appeal relates to future interest from the date of the suit up to the date of realization. The appeal was filed of Rs. 10, stating that the value of the appeal cannot be set off as it is incapable of valuation.

“Now the amount of interest has been ascertained to Rs. 1,155 and embodied in the decree of this Hon’ble Court as decreed by the Court in addition to the amount decreed by the Court in the suit. Rs. 1,155 is payable. Rupees 10 having been paid, deficiency of Rs. 1,145 to be made good by the plaintiff in the memorandum of appeal.”

1905

BHAWANI  
PRASADv.  
KUTUB-UN-  
NISSA BIBI.

STANLEY, C.J., and BANERJI, J.—This matter comes before us on a report of the office in regard to the court fee payable on the appeal. This suit was brought to raise the amount due upon a mortgage by a sale of the mortgaged property. The plaintiffs in the suit claimed future interest from the date of the institution of the suit up to the date of realization. The Court below awarded future interest up to the date fixed by the decree for payment. The plaintiffs objected to the limit fixed by the decree of the lower Court in regard to the time up to which interest should be calculated and filed an appeal in respect of interest from the date fixed by the decree for payment up to the date of realization. The amount of this interest, it is obvious, could not be calculated at the time when the appeal was filed. The appeal was allowed, and according to the report of the office a sum of Rs. 47,400 odd has been awarded in respect of future interest. The office has reported that a fee is now payable in respect of the amount so added to the decree, namely, a court fee of Rs. 1,155. Only Rs. 10 were paid on the filing of the appeal. It is contended by the learned advocate for the plaintiffs that Rs. 10 was the fee prescribed by the Fees Act. Article 17 (vi) of schedule II to the Act provides that in respect of a plaint or memorandum of appeal in which the subject matter (not previously mentioned) where it is not possible to ascertain a money value the subject matter in dispute and otherwise provided for by the Act, a fee of Rs. 10 is payable. We are not aware of any other provision of the Act which states the fee payable upon an appeal preferred in respect of future interest. The office seems to think that Article 17 (vi) meets this case. That section provides that a fee is payable in respect of the profits, or for immovable property and in respect of the account, if the profits or amount decreed is less than the profits claimed or the amount at which the relief sought, the decree shall not be set aside on the difference between the fee actually paid and the fee which would have been payable had the suit comprised the profits or the amounts so decreed shall have been paid by the officer. We look in vain in this section for any provision which states that it includes a claim for future interest



in respect of a mortgage debt which is sought to be enforced by sale. We think that it has been rightly contended here that sub-section (vi) of Article 17 of schedule II of the Act is applicable. In this view we are supported by a decision of Westropp, C. J., in the case of *Krishnarav v. Antaji Virupuksha* (1). In that case it was held that the Court Fees Act, section 11, is not applicable to interest accruing upon a decree in a suit which is neither for mesne profits nor for immovable property and mesne profits, nor an account, but simply an action for money lent. In that case the suit was for money lent by the plaintiff to the defendant together with interest. There is no difference in principle so far as we can see between the case of a suit for money lent and a suit for sale on a mortgage. Neither of these suits is included in section 11. We therefore allow the objection to the report and declare that the amount of court fee already paid is sufficient.

1905

BHAWANI  
PRASAD  
v.  
KUTUB-UN-  
NISSA BIBI.

## REVISIONAL CRIMINAL.

1905  
March 7.

*Before Mr. Justice Aikman.*

EMPEROR v. BISHAN DAS.\*

*Act No. XLV of 1860 (Indian Penal Code), section 415—Cheating—Definition—Sale of immovable property without mentioning incumbrances.*

The vendor of immovable property cannot be convicted of cheating because he omits to mention that there is an incumbrance on the property unless it is shown either that he was asked by the vendee whether the property was incumbered and said it was not, or that he sold the property on representation that it was unincumbered. *Horsfall v. Thomas* (2) referred to.

THE accused in this case, one Bishan Das, sold immovable property to the complainant, Babu Lal, for a sum of Rs. 750. Babu Lal subsequently discovered that the property which he had purchased was mortgaged to other property for some Rs. 20,000. The mortgage sale to Babu Lal was effected was silent as to the mortgage, and it also did not appear that he made any representation to the purchaser that

\* Criminal Revision No. 36 of 1905.

(1) (1875) 12 Bom., H. C. Rep., 227.

(2) (1862) 31 L. J., Ex., 322.

1905

EMPEROR  
v.  
BISHAN DAS.

sold to him was unincumbered. Bishan Das was prosecuted for the offence of cheating, and was convicted by a magistrate and fined Rs. 500 under section 417 of the Indian Penal Code, and this conviction was upheld on appeal by the Sessions Judge, who, however, reduced the fine to Rs. 250. Against his conviction and sentence Bishan Das applied in revision to the High Court.

Babu *Satya Chandra Mukerji*, for the applicant.

The Assistant Government Advocate (*Porter*), for the Crown.

AIKMAN, J.—The applicant, Bishan Das, was convicted by a magistrate of the first class of the offence of cheating and sentenced under the provisions of section 417 of the Indian Penal Code to pay a fine of Rs. 500 or in default to undergo three months' rigorous imprisonment. The conviction was affirmed on appeal by the learned Sessions Judge, but the fine was reduced to Rs. 250. This Court is moved in the exercise of its revisional powers to set aside the conviction on the ground that the facts found are insufficient to establish a charge of cheating as defined in section 415 of the Indian Penal Code.

It appears that the applicant, Bishan Das, sold to the complainant Babu Lal certain landed property which Babu Lal discovered had been previously mortgaged along with other property by his vendor Bishan Das. The sale-deed does not

state that the property sold is unincumbered, and it has not

been proved that Bishan Das actually deceived the complainant

by leading him to believe that the property was free from incumbrance. In my opinion the

charge is not supported. It is true that the explanation

in section 415 lays down that a dishonest concealment

falls within the meaning of the section. If

the application of the word "dishonestly" to be found

in the Indian Penal Code we find that a dishonest act is an

intention of causing wrongful gain to one

and wrongful loss to another. Section 23 defines

"dishonesty" as a gain by unlawful means of property

which a person gaining is not legally entitled. Similarly

"dishonesty" is defined as the loss by unlawful means

1905

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EMPEROR  
v.  
BISHAN DAS.

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of property to which the person losing it is legally entitled. The unlawfulness of the means used is a necessary element in criminal dishonesty. Now in the present instance I cannot find anything unlawful in the means used by the applicant. There was no obligation cast on him by law (*vide* section 55 of the Transfer of Property Act) to disclose to his vendee the existence of the mortgage, inasmuch as the mortgage had been effected by a registered instrument and the vendee could with ordinary care have ascertained its existence. He might also have ascertained its existence by questioning his vendor. Had he done so, and had the vendor falsely represented the property to be unincumbered, the case would have been very different, as there would have been an actual misrepresentation by the vendor sufficient to constitute the offence of cheating. It might be thought at first sight that illustration (i) appended to section 415 is opposed to the view set forth above, but the case contemplated in that illustration is clearly distinguishable. The illustration referred to deals with the case of a person selling or mortgaging an estate which he has previously sold and conveyed away. In that case a person who knows that he has got no right left to a property deals with it as if he had: his conduct amounts to false representation that he has a subsisting right in the estate although he well knows that he has not. In the case before me the seller still owned an interest, namely, the equity redemption in the property which he conveyed to the complainant. For all that he knew to the contrary the vendee might have been aware at the time of his purchase that the property he bought was under a mortgage. I have no hesitation in holding that the dishonest concealment of facts in the explanation to section 415 is a dishonest concealment which it is the duty of the person concealing them to disclose to the person with whom he is dealing. The magistrate argues that it is not necessary that wrongful loss should have been caused, inasmuch as the complainant, if not dishonest, was at least fraudulent. He refrained from disclosing the existence of the mortgage. His conduct might be immoral, but it would not in any

1905

EMPEROR  
v.  
BISHAN DAS.

be fraudulent, any more than would the conduct of the seller of a horse who, knowing that the horse had a splint, did not disclose the existence of the splint to a purchaser. Of course I refer to a case in which the vendor has not actively deceived the purchaser by representing the horse to be sound. Illustration (a) of section 17 of the Contract Act is as follows:—"A sells by auction to B a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A." The same is the law in England. In the case of *Horsfall v. Thomas* (1) Bramwell, B. says:—"The fraud must be committed by the affirmance of something not true within the knowledge of the affirmer or by the suppression of something which is true and which it was his duty to make known." Where there is a concealment of a fact I am of opinion that there is neither fraud nor dishonesty within the meaning of the Criminal Law unless there is a duty imposed by law as between the accused and the person with whom he is dealing to make that fact known. For the above reasons I quash the conviction of the applicant Bishan Das under section 417 of the Indian Penal Code. The fine, if paid, will be refunded.

## APPELLATE CIVIL.

*Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.*

**DAS (PLAINTIFF) v. GIRDHARI LAL (DEFENDANT).\***

*of 1877 (Indian Registration Act), section 17—Act No. IV of 1877 (Transfer of Property Act), section 54—Registration—Assignment of profits—Lambardar and co-sharer.*

ment of profits already due by a lambardar to a co-sharer registered, either by virtue of section 17 of the Indian Transfer of Property Act, or by virtue of section 54 of the Transfer of Property Act.

In this case sued for recovery of certain arrears of profits on the following circumstances. On the 13th of

No. 507 of 1903, from a decree of H. B. J. Bateman, J. Bareilly, dated the 3rd of March 1903, reversing a decree of the District Judge, Bareilly, dated the 1st of November 1902.

1905

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DAMODAR  
DAS  
v.  
GIRDHARI  
LAL.

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June 1900, Bhola Nath and Nand Kishore zamindars and co-sharers of mauza Shahi sold to the plaintiff by means of an unregistered deed their right to receive from the lambardar certain profits of their shares in mauza Shahi and two other villages which had accrued due in respect of the year 1306 fasli. The amount claimed was Rs. 280. The plaintiff named as defendants the heirs of one Dori Singh, a former lambardar, the then lambardar, Girdhari Singh, and his vendors, Bhola Nath and Nand Kishore, and asked for a decree against all, or any of them who might be found liable. The Court of first instance (Assistant Collector of Bareilly) decreed the claim in part. The lambardar Girdhari Singh appealed. The lower appellate Court (District Judge of Bareilly) reversed the decree of the first Court and dismissed the plaintiff's suit upon the ground that the deed of assignment upon which the claim was based required registration and was not registered. The plaintiff appealed to the High Court.

Dr. *Satish Chandra Banerji* (for whom Mr. *M. L. Agarwala*), for the appellant.

*Munshi Govind Prasad*, for the respondent.

STANLEY, C.J., and BANERJI, J.—The suit which has given rise to this appeal was brought by the plaintiff to recover from the heirs of one Dori Singh, deceased lambardar, and from Girdhari Singh, respondent, who succeeded Dori Singh in the office of lambardar, profits for the year 1306 Fasli. Those profits were due to the defendants Nos. 7 and 8, who, by a sale-deed dated the 13th of June 1900, conveyed the profits so due to the plaintiff. As assignee from those co-sharers the plaintiff brought the present suit. The Court of first instance decreed the claim. The lower appellate Court has dismissed the suit upon two grounds, first, that there was a misjoinder of parties, and, secondly, that the sale-deed on the basis of which the plaintiff brought the suit required registration and was not registered. The plaintiff contends that the registered conveyance conveyed no title to the plaintiff. The plaintiff thinks the Court below was wrong. The plaintiff sought to recover the amount claimed from all the defendants. Under section 28 of the Code of Civil Procedure, 1908, may be joined as defendants against whom the right to any

1905

DAMODAR  
DAS  
v.  
GIRDHARI  
LAL.

relief is alleged to exist, whether jointly, severally or in the alternative, in respect of the same matter, and judgment may be given against such one or more of the defendants as may be found to be liable according to their respective liabilities without any amendment. In this case, as we have said, the plaintiff alleged his right to relief to exist jointly against the defendants. Whether that allegation is right or wrong is a question which the Court had to determine. It is very probable that Girdhari Singh, respondent, who is the successor in office of the first lambardar, Dori Singh, did not collect the whole of the profits for the year 1306 fasli. Indeed it is not alleged that he did collect the whole of the profits. If it be found that he only collected a part of the profits, his liability should, in the decree to be passed in the suit, be limited to the amount of the plaintiff's share which he collected and not to the whole amount due to the plaintiff. That, however, would be no reason for dismissing the suit on the ground of misjoinder of parties. In fact, upon the allegations in the plaint, and having regard to the relief asked for, it could not be said that there was a misjoinder of parties. The first ground therefore on which the claim has been dismissed cannot be sustained. The second ground is that the sale is void of force. The learned Judge says:—"The sale in question is as regards this suit so much waste paper. It is a transfer of the profits of one year for Rs. 260: under section 54 of the Transfer of Property Act it is a sale of intangible property and therefore ought to be registered. Similarly under section 55 of the Registration Act, it ought to be registered." It is true that section 17 of the Registration Act has no application to the sale-deed. The sale-deed in favour of the plaintiff is valid and operative to create, declare or assign any right, interest in or in any immovable property. What was assigned to the plaintiff was the profits for the year 1306 fasli, of which the assignment had been collected by the defendant and had accrued due to the plaintiff's vendors from whom it was in reality a debt due to the plaintiff's vendors and not the lambardar. No right to or interest in immovable property was conveyed to the plaintiff. Section 54 of the Transfer of Property Act is equally inapplicable. That section

requires that in the case of tangible immovable property of the value of Rs. 100 and upwards, or in the case of a reversion or other intangible thing, a sale can be made only by a registered instrument. Intangible thing in that section means things in the nature of a reversion, not a debt which has already become due to the vendor by a third person. The learned Judge is clearly wrong in holding that section 54 required the sale-deed in this case to be registered. Both the grounds therefore upon which the suit has been dismissed must be repelled. We accordingly allow the appeal, set aside the decree of the Court below, and remand the case to that Court under the provisions of section 562 of the Code of Civil Procedure with directions to readmit the appeal under its original number in the Register and dispose of it on the merits. Costs here and hitherto will follow the event.

*Appeal decreed and cause remanded.*

1905

DAMODAR  
DAS  
v.  
GIRDHARI  
LAL.

## REVISIONAL CRIMINAL.

1905  
March 14.

*Before Mr. Justice Aikman.*

EMPEROR v. ABDUL SATTAR AND OTHERS.\*

*Act No. III of 1867 (Gambling Act), section 1—Common gaming house—*

*Definition—Profit derived from odds in favour of the bank.*

*Held* that a house was none the less a "common gaming house" with the meaning of section 1 of Act No. III of 1867 because the profit of owner, occupier or keeper of the house was derived, not from payments for the use of the house or the instruments of gaming, but from the itself, by reason of the odds being always in favour of the bank.

ABDUL SATTAR and others were convicted and under section 3 of Act No. III of 1867 by a Magistrate 1st class of Benares, for keeping a common gaming house. It appeared that the Magistrate of the district had granted a license to play a game called "French croquet," but at the time of fact when the house was raided by the Police a game of chance was in progress for which no license had been obtained. In playing this game the accused managed the tables and the profit was derived from the odds being largely in favour of the

\* Criminal Revision No. 47 of 1905.



1905

EMPEROR  
v.  
ABDUL  
SATTAH.

From their convictions and sentences the accused appealed to the Sessions Judge, who dismissed their appeal. They then applied in revision to the High Court, urging, as in the Court below, that the house could not properly be called a "common gaming house" because the applicants' profit was not derived from any charge for the use of the house or of the instruments of gaming, or in any manner *ejusdem generis*.

Mr. C. Ross Alston and Mr. R. K. Sorabji, for the applicants.

The Assistant Government Advocate (Mr. W. K. Porter), for the Crown.

AIKMAN, J.—On the facts found by the lower Courts I have no hesitation in coming to the conclusion that the finding of the Magistrate to the effect that the house occupied by the applicants was a common gaming house as defined in Act No. III of 1867 is right. In my opinion the words in that definition "or otherwise howsoever" cannot be regarded as restricting the profit or gain of the owner or occupier of the house to profit or gain in a manner *ejusdem generis* with what precedes those words. The application is dismissed.\*

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\* See also Criminal Revision No. 834 of 1903 decided on the 27th of January 1904, the judgment in which was as follows:—

AIKMAN, J.—In this case one Sukhanand was convicted by the District Magistrate of Chakrata of keeping a common gaming house and ordered to pay a fine of Rs. 80, or in default to undergo one month's imprisonment. The learned Sessions Judge has reported the case with the recommendation that the conviction be set aside. In his order the learned Sessions Judge says he thinks the accused is not a common gaming house as he is one of the gamblers himself. I do not at all concur with the learned Judge. If the view expressed by the District Judge were correct, any one might with impunity keep a gaming house so long as he himself joined in the games of chance played there. The findings of the Magistrate I have no doubt that the conviction under section 3 of Act No. III of 1867 was right. Let the record be

## APPELLATE CIVIL.

1905

March 23.

*Before Mr. Justice Blair and Mr. Justice Banerji.*INAYAT ALI KHAN AND OTHERS (DEFENDANTS) v. MURAD ALI KHAN  
AND OTHERS (PLAINTIFFS). \**Act No. XII of 1881 (N.-W. P. Rent Act), section 93—Act (Local) No. II  
of 1901 (Agra Tenancy Act), section 201—Finding of Court of Revenue as  
to title—Subsequent suit in Civil Court—Estoppel.*

The fact that a question of title has been decided by a Court of Revenue in the course of a suit exclusively triable by such a Court, although such decision was necessary to the determination of that suit, will not preclude the subsequent trial thereof by a Civil Court. *Shoo Narain Rai v. Rameshar Rai* (1) and *Ashraf-un-missa v. Ali Ahmad* (2) referred to.

THE facts out of which this appeal has arisen are as follows. Inayat Ali Khan and others, as recorded co-sharers in a certain village, brought a suit in the Revenue Court against Murad Ali Khan, the lambardar, for their recorded share of profits under the provisions of clause (b), section 93 of Act No. XII of 1881. The claim was resisted upon the ground that the plaintiffs were not in fact co-sharers and were not therefore entitled to profits. The Court of first instance (Assistant Collector) dismissed the suit, holding that the appellants, although recorded as co-sharers had ceased to be so. An appeal was preferred to the District Judge under section 189 of Act No. XII of 1881. He found in favour of the appellants and decreed their claim. This was after the present Tenancy (No. II of 1901) had come into force. Thereupon the present suit was brought by Murad Ali Khan and others in the Civil Court asking for a declaration that they were owners of a share in respect of which the defendants had in the past obtained a decree for profits; that they have been in proprietary possession of the share, and that the defendants ceased to own any share in the village. They put forward the suit under the last portion of sub-section (3) of section 201 of the Agra Tenancy Act, 1901. The Court of first instance (2nd Additional Munsif of Meerut) dismissed the suit.

\* First Appeal No. 74 of 1904, from an order of Babu Pramotha Nath Banerji, Officiating Assistant Sessions Judge of Meerut, exercising powers of Subordinate Judge, dated the 14th of May 1904.

1905

INAYAT ALI  
KHAN  
v.  
MURAD ALI  
KHAN.

opinion that the plaintiffs were precluded from bringing it by the decision of the appellate Court in the suit for profits above referred to. On appeal by the plaintiffs the lower appellate Court (2nd Assistant Sessions Judge of Meerut with powers of a Subordinate Judge) held that the suit was maintainable, having regard to the provisions of section 201, sub-section (3), of the Tenancy Act and remanded the case for decision upon the merits. From this order of remand the defendants appealed to the High Court.

Babu *Devendro Nath Ohdekar*, for the appellants.

Mr. *Abdul Majid*, for the respondents.

BLAIR and BANERJI, JJ.—The suit which has given rise to this appeal was brought under the following circumstances. The appellants, who are recorded co-sharers in a village, brought a suit in the Revenue Court against the first respondent, who is the lambardar, for their recorded share of profits, under the provisions of clause (h), section 93 of Act No. XII of 1881. The claim was resisted on the ground that the then plaintiffs, present appellants, were not co-sharers, and were not therefore entitled to profits. The Court of first instance (Assistant Collector) dismissed the suit, holding that the appellants, although ordered as co-sharers, had ceased to be so. An appeal was referred to the District Judge under section 189 of Act No. V of 1881. He found in favour of the appellants and decreed their claim. This was after the present Tenancy Act (No. II of 1901) had come into force. Thereupon the present suit was brought by the respondents in the Civil Court for a declaration that they are the owners of the share in respect of which the appellants obtained a decree for profits; that they have been in proprietary possession of the share, and that the appellants ceased to own any share in the village. They pursued the suit under the last portion of sub-section (3), section 201, of the Tenancy Act, 1901. The Court of first instance dismissed the suit, being of opinion that the plaintiffs were precluded from bringing it by the decision of the appellate Court in the suit for profits referred to above. The lower appellate Court has held that the suit is maintainable, having regard to the provisions of section 201, sub-section (3), of the

Tenancy Act, and has remanded the case to the Court of first instance. From this order of remand the present appeal has been brought.

We are of opinion that as the appeal in the suit for profits was not decided under the provisions of the Tenancy Act, that Act having come into operation after the filing of the appeal, and as the Court in deciding the appeal did not give effect to the presumption referred to in sub-section (3) of the Act, that sub-section does not apply. What we have to determine is whether the decision of the appellate Court in the suit for profits is any bar to the maintenance of the present suit, in which the plaintiffs seek to have their title established, that is to say, whether the decision in the suit for profits upon the question of title is conclusive between the parties. Our difficulty in deciding this question has arisen in consequence of certain observations contained in the judgment of the Full Bench in *Sheo Narain Rai v. Rameshar Rai* (1). After giving the matter our best consideration, we are of opinion that the present suit is maintainable. The previous suit for profits was brought in the Court of Revenue under section 93 of Act No. XII of 1881. The decision of the appellate Court in that suit, although it is the decision of a Civil Court, has no higher effect than if it were the decision of the Court of first instance, that is of the Revenue Court. Consequently the fact that it was the appellate Civil Court which determined the question of the title of the parties in that suit cannot affect the matter in issue in this appeal. There can be no doubt that it was necessary for the Revenue Court in order to enable it to make a decree in the suit for profits to decide the question of the title of the plaintiffs in that suit, that the issue of title was a direct and valid issue in that suit. But we are unable to hold that the decision of that issue by the Revenue Court is conclusive in a suit brought in the Civil Court to try the question of title. The decision of that question of title in the suit before the Revenue Court was made for the purposes of that particular suit, and cannot be deemed to be absolutely conclusive. Section 93 of Act No. XII of 1881 precluded the Civil Court from taking cognizance of any

1905

INAYAT ALI  
KHANv.  
MURAD ALI  
KHAN.

1905

INAYAT ALI  
KHAN  
v.  
MURAD ALI  
KHAN.

dispute or matter in which any suit of the nature mentioned in the section might be brought. A suit for the determination of the plaintiff's proprietary title to immovable property is not one of the classes of suits which might be brought in a Court of Revenue under that section and the dispute or matter involved in such a suit is not the same dispute or matter in regard to which a suit might be brought in the Revenue Court. That section therefore is no bar to the maintenance of the present suit. In the recent case of *Ashraf-un-nisa v. Ali Akmad*, (1) it was held by a Bench of this Court that the decision of a question of title in a suit for profits or any other suit brought in a Rent Court cannot operate as *res judicata* in a subsequent suit brought in the Civil Court in which the proprietary title of the parties is in question. We do not see sufficient reason for dissenting from this ruling. It is clear from the provisions of the Tenancy Act of 1901 that it is the intention of the Legislature that all questions of title should be determined by the Civil Court. So that the question raised in this appeal will not arise in future. We are of opinion that the order of remand made by the court below was right and dismiss the appeal with costs, including fees on the higher scale.

*Appeal dismissed.*

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkill.*

MIAN JAN (DEFENDANT) v. ABDUL (PLAINTIFF).\*

*Procedure Code, sections 87, 88 and 89—Absconding offender—Sale of property of absconder—Illegal sale—Suit to recover property sold from purchaser—Jurisdiction.*

The property of an absconding offender was attached and sold by a court acting under section 88 of the Code of Criminal Procedure. It was found that the procedure culminating in the sale was irregular and illegal, it was held that the Civil Courts had jurisdiction to entertain a suit by the owner of property so sold to recover the same in the hands of a purchaser.

In this case one Jitu filed a complaint against Abdul under section 426 of the Indian Penal Code. Process was issued

\* Appeal No. 46 of 1904, under section 10 of the Letters Patent.

(1) (1904) I. L. R., 26 All., 601.

1905

MIAN JAN

v.  
ABDUL.

against Abdul, but he failed to appear. Proceedings under chapter VI, part C, of the Code of Criminal Procedure, were taken against him, and ultimately certain house property belonging to Abdul was attached and sold by auction. On the ground that the proclamation issued under section 87 of the Code was not properly published and that there were other irregularities in the attachment and sale of his property Abdul applied in revision to the Sessions Judge asking that the sale might be set aside, and that matter was referred to the High Court under section 438 of the Code, but the Court declined to interfere: *vide Abdullah v. Jitu* (1). The suit out of which this appeal has arisen was brought by the plaintiff to recover from the auction purchaser a share in a certain house belonging to the plaintiff which had been sold in the manner above described and bought by the defendant. The Court of first instance (Subordinate Judge of Allahabad) dismissed the suit, holding that no suit of the kind would lie in a Civil Court. The plaintiff appealed to the District Judge, who confirmed the decree of the Court below. Thereupon the plaintiff appealed to the High Court, where his appeal, coming before a single Judge of the Court, was allowed and the suit remanded under the provisions of section 562 of the Code of Civil Procedure for trial on the merits. The reasoning upon which this order was based will be found in the following judgment in an appeal by the same plaintiff against a similar decree dismissing a similar suit brought by him against another auction purchaser.\*

"BLAIR, J.—This is an appeal against a dismissal by both below of the plaintiff's suit upon the ground that the Civil Court had no jurisdiction to entertain it. The plaintiff was under a criminal charge for some reason or other absconded, and the Court believed that he absconded in order to escape being brought to trial upon the charge made against him, and it made an order which was followed up by what is called a proclamation of sale of some immovable property belonging to the absconder. The Court was within its rights in making that order, but, apart from any other irregularities, the proclamation failed to state the time within which and the place at which the absconder should present himself to save the sale of his property. That proclamation is an absolute nullity, it being impossible to say that the absconder did not present himself at some place unknown and within

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(1) (1900) I. L. R., 22 All., 216.

\* Weekly Notes, 1904, p. 159.

1905

MIAN JAN

v.

ABDUL.

some time unspecified. It was therefore of no validity whatever, and not worth the paper upon which it was written. Having failed to specify the circumstances under which the property would be saved from sale, and there having been no violation of the conditions imposed by the proclamation of sale, no order for sale could legally issue. The plaintiff in the present case wishes to get that illegal alienation set aside, both as against those who are responsible for it and the purchaser at the sale. There is a provision in the Code of Criminal Procedure by which an absconder returning or being brought to the Court by which the attachment was made is entitled to prove that he did not abscond or conceal himself to avoid the execution of the warrant, and also that he had no such notice of the proclamation as to enable him to attend within the time specified therein. Under those circumstances he can claim some sort of restitution of his property. But that section has no bearing whatever in the case when the proclamation of sale is an absolute nullity in point of law. If then there is no provision in the Code of Criminal Procedure for restitution under the circumstances of this case, and no section except section 89 is suggested to me, then, if I were to follow the ruling of the Court below, I should be holding that there was no remedy left to the man whose property had been seized and sold under the thinnest and most indefensible colour of law. I have no hesitation in saying that the law is not so, and the plaintiff had a right to maintain the suit which was dismissed and also the appeal which was dismissed. The case having been decided in the Courts below upon a question of jurisdiction, this case will go back to the Court of first instance through the lower appellate Court under the provisions of section 562 of the Code of Civil Procedure, there to be dealt with upon its merits.

The appeal is allowed with costs."

Against the order of remand made by Blair, J., the defendant appealed under section 10 of the Letters Patent.

*Babu Durga Charan Banerji* and *Maulvi Muhammad Zahur*, for the appellant.

*Mr. R. K. Sorabji*, for the respondent.

ANLEY, C.J., and BURKITT, J.—There is in our opinion no ground for this appeal. The judgment of our brother Blair is to us to be unassailable. It has been argued by the learned vakil for the appellant that hardship will be imposed upon his client if it is held that the purchase made by him was not a valid and binding purchase. The statute which empowers a Criminal Court to sell is perfectly clear and explicit in its terms. It provides that the proclamation shall be published, and that the mode in which the proclamation is to be published is given in section 87. Further than that, the section provides that a statement in writing by the Court issuing the proclamation



to the effect that the proclamation was duly published on a specified day shall be conclusive evidence that the requirements of this section have been complied with and that the proclamation was published on such day. Now if the purchaser had taken the ordinary precaution of ascertaining whether the Court had issued a statement in writing to the effect that the proclamation was duly published, he would not have been involved in this litigation. There has been carelessness on his part undoubtedly, and he must take the consequences of it. It appears to us that the sale which purported to be carried out by the Criminal Court was in this instance a nullity and passed no estate whatever to him. We therefore dismiss the appeal with costs.

1905

MIAN JAN

v.

ABDUL.

*Appeal dismissed.*

*Before Mr. Justice Blair and Mr. Justice Banerji.*

AHSAN-UL-LAH AND OTHERS (OBJECTORS) v. DAKKHINI DIN

(DECREE-HOLDER).\*

1905

March 25.

*Civil Procedure Code, section 206—Execution of decree—Limitation—Amendment of decree—Act No. XV of 1877 (Indian Limitation Act), sections 19, 20 and 21, Schedule II, Article 179—Part payment by one of several judgment-debtors.*

An order granting an application under section 206 of the Code of Civil Procedure is not an order passed upon review of judgment within the meaning of article 179 of the second schedule to the Indian Limitation Act, 1877, and has not the effect of extending the period of limitation for execution of the decree. *Daya Kishan v. Nanhi Begam* (1), *Tarsi Ram v. Man Singh* (2) and *Kallu Rai v. Fakiman* (3) followed. *Kishen Sahai v. The Collector of Allahabad* (4) referred to. *Kali Prosunno Basu Roy v. Lal Mohun Guha Roy* (5) dissented from.

A payment made by one of several persons jointly liable under a decree otherwise than as agent of his co-judgment-debtors, cannot operate to save limitation as against any of the judgment-debtors other than the person making the payment.

THE facts of this case are fully stated in the judgment of the Court.

\*First Appeal No. 148 of 1904, from a decree of Pandit Rajnath Sahib, Subordinate Judge of Allahabad, dated the 17th of May 1904.

- (1) (1898) I. L. R., 20 All., 304. (3) (1890) I. L. R., 13 All., 124.  
 (2) (1886) I. L. R., 8 All., 492. (4) (1881) I. L. R., 4 All., 137.  
 (5) (1897) I. L. R., 25 Calc., 258.

1905

AHSAN-UL-  
LAH  
v.  
DAKKHINI  
DIN

Mr. *Abdul Majid* and The Hon'ble Pandit *Sundar Lal*,  
for the appellants.

Babu *Jogindro Nath Chaudhri* and Maulvi *Rahmat-ul-lah*, for the respondent.

BLAIR and BANERJI, JJ.—This is an appeal from the judgment and decree of the Subordinate Judge of Allahabad granting execution of a decree for sale passed on the 22nd of January 1899 against one Zia-ul-Haq and his wife Musammat Gul Bibi. The latter was made a party to the suit on the ground that she was the transferee of a part of the mortgaged property. An application for an order absolute for sale under section 89 of the Transfer of Property Act was made on the 7th of December 1899 and was granted on the 14th of April 1900. The present application for execution was presented on the 3rd of June 1903, that is, after the expiry of more than three years from the date of the order absolute. The application is on the face of it barred by limitation, but the decree-holder invokes in aid certain proceedings to which we shall presently refer. On the 25th of September 1902 the decree-holder made an application under section 206 of the Code of Civil Procedure for amendment of the order absolute. As Zia-ul-Haq had in the meantime died, his legal representatives were made parties to the application. Some of these legal representatives being minors, an application was also made for the appointment of Gul Bibi as their guardian *ad litem*. Upon this application a notice was issued to Gul Bibi to show cause why she should not be appointed guardian of the minors, the 22nd of November 1902 being the date fixed for ag. On that date an order was made appointing her lian of the minors, and a further order was passed directing notice under section 248, cl. (b), of the Code of Civil Procedure to issue. The learned Subordinate Judge has held that a fresh start for the computation of limitation was obtained by the decree-holder from the date of issue of this notice, under article 17, schedule II, of the Limitation Act, and that as the application for execution was made within three years from that date it was within time. This view of the learned Subordinate Judge cannot be supported. A notice under section 248 presupposes the presentation of an application for execution

1905

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AHSAN-UL-  
LAN  
v.  
DAKKHINI  
DIN.

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and the pendency of such an application in a Court. No such application was pending at the time when the Court in this case directed notice to issue under section 248, cl. (b). The application pending was the one for amendment of the order absolute. Mr. *Chaudhri*, the learned advocate for the appellant, conceded in the argument before us that an application for amendment cannot be regarded as an application for execution. Further, although the notice which was actually issued purported to be a notice under section 248, cl. (b), yet it called upon the parties to whom it was issued to show cause why the application for amendment should not be granted. So that it was, manifestly, not a notice which could be issued under section 248 calling upon persons against whom an application for execution had been made to show cause why execution should not be granted. The Court below was therefore wrong in holding that the notice issued on the 22nd of November 1902 saved the operation of limitation.

It was, however, argued that the application of the 25th of September 1902 for amendment of the order absolute afforded to the decree-holder a new start for the computation of limitation. If that application be regarded simply as an application for amendment, it was not an application to take a step in aid of execution. This was decided in the case of *Daya Kishan v. Nanhi Begam* (1), and in the rulings referred to in that case. It was further contended that the application for amendment of the order absolute was, in reality, an application for review of judgment. This contention also is, in our opinion, untenable. The application in this case was in form and substance an application for amendment under the provisions of section 206 of the Code of Civil Procedure. It does not ask the Court to review its judgment in the proceedings under section 89 of the Transfer of Property Act, but only prays that the formal order absolute, which, it was said, did not harmonise with the judgment of the Court, be amended. It is, therefore, clear, an application for amendment under section 206 and not an application for review of judgment. The learned vakil for the appellants relied upon the ruling of the Calcutta High Court,

1905

AHSAN-UL-  
LAH  
v.  
DAKKHINI  
DIN.

in *Kali Prosunno Basu v. Lal Mohun Guha* (1) as supporting his contention that the order granting an application for amendment of a decree under section 206 of the Code, is an order passed upon review of judgment within the meaning of article 179, schedule II, clause (3), of the Limitation Act. That ruling, no doubt, supports the contention of the learned vakil, but it is opposed to the view taken by this Court in the case of *Daya Kishan v. Nanhi Begam* (2). The learned Judges of the Calcutta High Court in deciding the case referred to were themselves in doubt as to the correctness of their view, and relied upon the ruling of this Court in the case of *Kishan Sahai v. The Collector of Allahabad* (3). That ruling was considered in the case of *Daya Kishan v. Nanhi Begam*, and it was observed that "proceedings under section 206 of the Code could not be regarded as proceedings of the same nature as proceedings under section 623." The case of *Kishan Sahai v. The Collector of Allahabad* was explained in the case of *Kallu Rai v. Fahiman* (4), and it was pointed out that the proceedings which were taken in that case were in reality proceedings which could only have been taken under section 623 of the Code. We agree with the rulings in *Daya Kishan v. Nanhi Begam* (2) and in *Tarsi Ram v. Man Singh* (5) and *Kallu Rai v. Fahiman* (4) referred to in the judgment in that case. We are therefore of opinion that the application of the 25th of September 1902 which professed to be and was in fact an application for amendment only, cannot be deemed to be an application for review of judgment so as to justify the computation of limitation from the date of the order passed on that application. Consequently the decree-holder in this case cannot avail himself of the application made by him on the 25th September 1902 for amendment of the order absolute or of the order passed upon that application.

It has, however, been found, and this finding has not been questioned <sup>SC</sup> by the learned counsel for the appellants, that on the 21st of November 1900 and the 13th of January 1902 two payments were made by Zia-ul-Haq, which appear in his hand-

(1) (1897) I. L. R., 25 Calc., 258.

(3) (1881) I. L. R., 4 All., 187.

(2) (1898) I. L. R., 20 All., 304.

(4) (1890) I. L. R., 13 All., 184.

(5) (1886) I. L. R., 8 All., 492.

writing. The payments were made by money order, and were noted under his signature in the coupon attached to each of the two money orders by which the money was remitted. These part payments appearing in the handwriting of Zia-ul-Haq save the operation of limitation as against his legal representatives, under the provisions of section 20 of the Limitation Act. We have, however, to consider the case of Musammat Gul Bibi, who is a judgment-debtor not only as one of the legal representatives of Zia-ul-Haq, but also in her own right. As legal representative of Zia-ul-Haq the application for execution is within time as against her, it having been filed within three years of the dates of the part payments made by Zia-ul-Haq. The lower Court has overlooked the fact that she is a judgment-debtor in her own right. The question therefore is whether the part payments by Zia-ul-Haq can enure to the benefit of the decree-holder as against Gul Bibi in her capacity as one of the judgment-debtors to the decree. We are unable to accede to the contention of the learned vakil for the appellants that part payment by one of the debtors will take the case out of the operation of the Statute of Limitation against the other debtors who did not make such part payment. The principle upon which a part payment saves limitation is that such payment amounts to an acknowledgment of the debt, which in law implies a promise to pay. A payment, therefore, by one of several persons liable to pay cannot be regarded as an acknowledgment by any of the persons so liable other than the person making it. There cannot be any doubt that a promise by one of several debtors to pay, cannot be deemed to be a promise by the other debtors, unless the person making the promise is the agent of the others. On general principles one debtor, by acknowledging a debt or making a part payment otherwise than as agent of the other debtors, cannot keep alive the right of the creditor against those debtors. Sections 19 and 20 of the Limitation Act do not lay down a general rule to the effect that an acknowledgment or part payment by one of the debtors saves the operation of limitation as against all the debtors. Consequently section 21 of the Act cannot be deemed to be an exception to the rule. We agree with the learned author of Mitra on the Law

1905

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AHSAN-UL-  
LAH  
v.  
DAKKHINI  
DIN.

1905

AHISAN-UL-

LAH

v.

DARAKHINI

DIN.

of Limitation that "section 21 mentions those cases only in which the act of one of a set of persons is likely to be considered as the act of the others and by way of explanation it tells us that even in these cases the acknowledgment of one shall not renew the period of limitation against others " (see page 304, 3rd edition). In this view part payment by Zia-ul-Haq cannot save the operation of limitation against Gul Bibi, and the application for execution must be held to be time barred as against her in her personal capacity as a judgment-debtor. We accordingly allow the appeal and dismiss the application for execution in so far as it seeks to enforce the decree against Gul Bibi, otherwise than as one of the legal representatives of Zia-ul-Haq. She will get her costs in this Court and also in the Court below. As against the legal representatives of Zia-ul-Haq the decree-holder is entitled to execute the decree, and the order of the Court below must be affirmed.

The decree-holder has preferred an objection under section 561 of the Code of Civil Procedure in respect of the order of the Court below refusing to bring to sale the income from the markets of Gaura and Bharwari. As the order absolute obtained by the decree-holder did not order the sale of this property, the decree-holder in execution of the decree obtained by him is not entitled to bring this property to sale and the order of the Court below in this respect is right. The objection therefore fails and is dismissed with costs.

*Decree modified.*

## PRIVY COUNCIL.

P. C.  
1905  
May 11.  
June 29.

BISHAMBHAR DAS (PLAINTIFF) v. DRIGBIJAI SINGH (DEFENDANT)  
AND ANOTHER APPEAL.

[On appeal from the Court of the Judicial Commissioner of Oudh.

*Hindu Law—Endowment—Succession to property of mahant—Chela—Succession in management of endowed property under deed of endowment—Mortgage by manager—Money advanced out of profits of dedicated property—Right of successor to sue on mortgage.*

A mortgagee who was the mahant of an order of bairagis or religious mendicants, by a deed of endowment dedicated certain self-acquired property to the service of an idol, of which he made himself trustee and manager, and nominated and appointed the plaintiff, who was his chela, to succeed him on his death in the trusteeship and management. In a suit on the mortgage the evidence showed that the money advanced to the defendant was part of the profits of the estate so dedicated. *Held* by the Judicial Committee (reversing the decision of the Court of the Judicial Commissioner of Oudh) that the plaintiff on his succession was entitled as such trustee and manager to maintain the suit and recover the money due by the defendant on the mortgage.

Two appeals consolidated against two judgments and two decrees (9th August 1900, and 21st September 1900) of the Court of the Judicial Commissioners of Oudh, whereby two decrees (30th October 1899) of the Court of the Subordinate Judge of Sitapur were reversed, and two suits brought by the appellant were dismissed with costs.

The suits were brought to recover the amounts secured by two mortgages, one executed by the respondent Drigbijai Singh on 7th January 1890 in favour of Mahant Gopal Das and one Munnu Singh, and the other executed by the same respondent in favour of Mahant Gopal Das alone on 10th January 1890. The question involved in these appeals was whether the appellant was entitled to sue, either as the trustee of a Hindu idol named Sri Sri Raghu Nathji, or as the disciple, heir and successor of Mahant Gopal Das.

Mahant Gopal Das had many years ago become a bairagi, renounced the world and joined the sect of vaishnavs, and according to the tenets of that sect he severed all connection with his parents and other natural relatives and led a celibate life. In course of time he became a mahant and from time to

*Present* :—Lord MACNAGHTEN, SIR ANDREW SCOTTE, and SIR ARTHUR WILSON.



1905

ISHAMBIHAR  
DAS  
v.  
DRIGBIJAI  
SINGH.

time adopted various chelas or disciples. Having acquired money by his own exertions he had erected temples in various districts and had established in each of them an image of the Hindu deity Sri Sri Raghu Nathji; the principal temple belonging to his mahantship being one called the Raj Gopal temple at Ajudhia in the district at Fyzabad. He had also become the proprietor of taluqa Agar Buzurg in the district of Kheri, and being desirous that the worship of the deities in the three temples, and the other religious and charitable acts performed by him should be continued during his life and after his death in perpetuity, he, on 13th February 1889 by a deed of endowment of that date, dedicated the taluqa to Sri Sri Raghu Nathji of the Raj Gopal temple, and constituted himself the trustee of that deity during his life, and appointed the appellant to succeed him as such trustee on his death, making provision also for the appointment of other trustees in succession. The material portions of this deed are set out in their Lordships' judgment.

The mortgages in suit were executed in 1890. That of 7th January of that year provided, amongst other things, that possession of the mortgaged property (certain villages) should be given to the mortgagees, and stipulated that, "if in delivering possession there be any neglect, delay, or wickedness on my (the mortgagor's) part I, will pay interest at the rate of 2 per cent. per mensem on the entire mortgage money without any dispute or quarrel from the date of this document to the date of delivery of possession. In both mortgages the mortgagee Mahant Gopal Das was described as "trustee and sarbarahkar (manager) of Sri Raghu Nathji of the Raj Gopal Temple at Ajudhia and zamin-dar of estate Agar Buzurg, pargana Bhur, district Kheri."

Mahant Gopal Das died on 20th October 1892, leaving the appellant as one of his chelas or disciples, who, having been nominated as his successor by Mahant Gopal Das, and such nomination having been ratified and confirmed by the mahants of seven of the neighbouring monasteries was indicated by them as mahant in succession to Gopal Das and assumed the management of all property which was in the possession of the latter at the time of his death, as trustee and manager of Sri Sri Raghu Nathji of the Raj Gopal temple at Ajudhia and in his

1905

BISHAMBHAR  
DAS  
v.  
DRIGBIJAI  
SINGH.

own right as mahant and heir of Mahant Gopal Das, and the name of the appellant was duly registered in respect of all the immovable property.

The interest of the mortgagee Munnu Singh in the mortgage of 7th January 1890 was by deed dated 26th November 1897 transferred to Sri Sri Raghu Nathji of the Raj Gopal temple under the trusteeship of the appellant.

The mortgagor Drigbijai Singh not having paid any portion of the principal or interest secured by the mortgages of 7th and 10th January 1890, Bishambhar Das instituted two suits on the mortgages on 14th January 1898 against him, making also defendants persons who had obtained interests in the mortgaged property subsequent to the mortgages sued upon.

The defendant Drigbijai Singh admitted the two mortgages but denied the right of the plaintiff to maintain the suits, alleging that the money secured by the mortgages was not due to Sri Raghu Nathji; and that the plaintiff was not the heir or successor of Mahant Gopal Das. He also alleged that he had given possession of the mortgaged property to the mortgagees, but that they had subsequently abandoned it: and he denied his liability for interest on either of the mortgages. The other defendants put the plaintiff to proof of the mortgages and of his title to recover on the basis of them.

The material issues were: (1) Is the plaintiff a trustee of the property in suit? (2) If he is not a trustee, has the plaintiff been appointed a mahant in succession to Gopal Das, and as a mahant is he the heir of the deceased and therefore entitled to the property in suit? (3) Is the plaintiff entitled to interest or penalty at the rate of Rs. 2 per cent. per mensem or not? (4) Was possession of the property mortgaged delivered to Mahant Gopal Das, and was it afterwards abandoned by him?

The Subordinate Judge decided all the issues in favour of the plaintiff. He held that the money advanced by Mahant Gopal Das on the security of the two mortgages had been drawn from the income of the endowed estate and therefore belonged to Sri Raghu Nathji, and the plaintiff as the trustee and manager of Sri Raghu Nathji was entitled to maintain the suit for the realization of the money; that the same was the case with the

1905

ISHAMBHAR  
DAS  
v.  
DRIGBIJAI  
SINGH.

interest of Munnu Singh under the first mortgage, who had transferred it to mahant Gopal Das; that the plaintiff was the disciple and heir of Gopal Das and as such was the rightful mahant duly appointed and confirmed in his place, and as heir of Gopal Das was entitled to maintain the suits for the money secured by the mortgages even if it be taken to have been advanced by Gopal Das from funds derived otherwise than from the income of property dedicated to Sri Raghu Nathji; that Drigbijai Singh did not give possession of the mortgaged property to the mortgagees, and in accordance with the terms of the mortgages the plaintiff was entitled to recover interest at 2 per cent. per mensem under the mortgage of 7th, and compound interest under that of the 10th January 1890.

In his judgment the Subordinate Judge observed:—

“Mahant Gopal Das was neither an ascetic (jogi) or sanyasi, and was therefore not governed by the rules of the Hindu Law prescribed for them. Mahant Gopal Das belonged to a sect of “*Nihang Vaishnavo*.” The ordinary rule of inheritance prescribed by the Hindu Law does not and cannot govern such people, who can have neither wife nor children, nor even mother or father, with whom they sever their connection, no sooner they join the order. Their father is their *guru* and their son, if he can be so called, is their *chela*. When a man can have no *sapinda*, *samanodak* or *bandhu*, how can the rules of inheritance which deal with the rights of these classes of heirs govern such a person? It is contended that the deceased was the founder of a new order of *Vaishnavo*. Even if he was, that does not bring him to the category of “*grihasths*.” Exhibit 26 (1) must in such case, be accepted as the only guide to the rules of inheritance, which would govern the property

(1) This exhibit was the translation of a copy of paragraph 4 of the *wajib-ul-arz* of pargana Haveli, Oudh, Fyzabad district, relating to the general custom amongst the *lambardars* and shareholders, caste *Bairagi*, of the district, as to the rights which obtained generally in the caste. As to the right of succession it stated:—“The Mahant is authorized to nominate any of his own disciples or a *gurbhai* (brother disciple) as his successor next Mahant after him in his life time. . . . . All collateral descendants of the real family and other relations are disconnected. In the shrine the *guru* (spiritual guide) and *chela* (disciple) meet together. The Mahant is authorized to nominate any of the *chelas* (disciples) of his shrine to be his successor. The person who is nominated as an heir becomes the owner of the whole property: he has no concern with the property of his real father. . . . The mahant never marries to produce an offspring. The *chela* (disciple) breaks up all connexion with his real family, and becomes a *sant* (ascetic) and has no concern left with the inheritance of his real father.”

1905

BISHAMBHAR  
SINGH  
v.  
DRIGBIJAI  
SINGH.

of the deceased *Mahant*. It was contended that Gopal Das was a "naeb", a thekadar, a zaminadar and a money-lender, and therefore he could not be an ascetic, who alone is not governed by the ordinary rules of Hindu Law. This I am compelled to say, is founded on a mistaken notion of the term ascetic. If by ascetic is meant a *sanyasi*, Gopal Das was certainly not one. There are, however, different orders of asceticism. Ascetics of the order to which Gopal Das and men of his persuasion belong are permitted to acquire property, though not for their personal use. Such property acquired must belong to their Deity. If this contention of defendants could, for one moment, be accepted, there would be an end to the *gaddis* of *mahants* in Dehra Dun, in the North-Western Provinces—to the several *gaddis* in Ajudhia. Raja Janak, King of Mithila, was an ascetic of a very superior order. This, however, did not prevent his ruling over a large tract of the country."

The Subordinate Judge therefore decreed both suits in favour of the plaintiff. The decree in the suit on the mortgage of 7th January 1890 directed that possession of the mortgaged property be made over to the plaintiff in lieu of principal and interest due under that mortgage with costs to be paid by the defendant Drigbijai to the plaintiff. The decree in the suit on the mortgage of 10th January 1890 directed that on 30th April 1900 the defendants do pay to the plaintiff the sum claimed with costs, and that in default the mortgaged properties be sold and the proceeds of sale applied in payment of the plaintiff's claim for principal, interest, and costs.

The defendant Drigbijai Singh preferred an appeal which came before a Bench of the Court of the Judicial Commissioner (Mr. ROSS SCOTT, and Mr. G. T. SPANKIE), who reversed the decrees of the Subordinate Judge and dismissed both suits. They said :—

"The plaintiff claimed to be entitled to the mortgagee's interest in the mortgage in two ways. He alleged that such interest was the property of the idol. He also alleged that if it were the property of Gopal Das, it passed to him as Gopal Das' heir.

"The Subordinate Judge found that Gopal Das had dedicated the whole of the property of which he died possessed to the idol. He also found that the money lent on the mortgage was advanced out of the profits of the Agar Buzurg estate after it was dedicated to the idol. He also found that the plaintiff was heir to the property of Gopal Das.

"It is not disputed that if the mortgagee's interest in the mortgage is the property of the idol, the plaintiff is entitled to it; but it is disputed that that interest is the property of the idol.

"In Mr. Mayne's work on Hindu Law (4th Edition), in paragraphs 396 and 397 the distinction is pointed out between an absolute dedication of property

1905

SHAMBHAR  
DAS  
v.  
RIGBIJAI  
SINGH.

to an idol, where there is a perfect trust, and the case in which a person applies his property to the founding of a temple or any other religious or charitable institution, keeping the property itself and the control over it absolutely in his own hands, in which case there is not an absolute dedication of the property, and the trust is apparent and not real. In other words, a trust must be created in order to make a dedication of property to an idol, and unless a trust is created, there is no dedication of the property, and the property remains the property of the owner. Now the oral evidence produced by the plaintiff does not prove that Gopal Das created a trust in favour of the idol of all the property of which he died possessed. It merely shows that Gopal Das, as a devout Hindu, looked upon all the property which he had acquired or might acquire as the gift of Sri Raghu Nathji, and therefore as trust property, to be applied to religious and charitable purposes. Where a pious man is of opinion that all his property is the property of God, that he is only a trustee, that the property should be applied to religious and charitable purposes, and applies the same accordingly, he does not thereby create a trust. There is nothing in the deed of endowment to indicate that Gopal Das created a trust in respect of any property except the Agar Buzurg estate. He refers to himself as having passed his life in the worship of Sri Raghu Nathji, and intending to pass it in that manner, and as having always applied, and intending to apply, his property to good works, and he refers to himself as desiring that after his death his property may be applied to defraying the expenses of the worship of Sri Raghu Nathji and to other good works; but these expressions are not, I think, sufficient to create a trust in respect of the property of which he died possessed. The Subordinate Judge was, I think, wrong in finding that all the property of which Mahant Gopal Das died possessed was dedicated by him to the idol in the Raj Gopal temple.

"The oral evidence produced by the plaintiff does not prove that the money lent to the defendant was part of the profits of the Agar Buzurg estate. From the description of Gopal Das in the mortgage-deed, where he is described as the trustee and manager of the idol of Sri Raghu Nathji in the Raj Gopal temple, it cannot be inferred, I think, that the money lent on the mortgage was the money of the idol.

"For these reasons I am of opinion that the interest of the mortgagee was not the property of the idol.

"It was contended for the defendant that there are four orders of Hindus, namely (1) Brahmachari, *i.e.*, he who professes to have prolonged the period of studentship, and to observe through life the practice of study, poverty, and continence; (2) Grihastha, *i.e.*, a house-holder, the Hindu of the second order, who after his course as a religious student marries and keeps house; (3) Vanaprastha, *i.e.*, the man who after the term of his house-holdership has expired has entered the third order, and has proceeded to a life in the woods; and (4) Sanyasi, *i.e.*, the man who has renounced the world and lives by mendicancy, most usually a worshipper of Siva—(the meanings of the terms are taken from Wilson's Glossary); that as Gopal Das did not belong to the third or fourth orders, he must be held to have belonged to the second order; that therefore the ordinary rules of inheritance governs the succession to

his property ; and that as the plaintiff, under those rules, was admittedly not the heir of Gopal Das, he was not entitled to succeed to the property of Gopal Das. Reference was made to Mayne's Hindu Law (4th Edition), page 456 : Mitakshara, Chapter II, Section 8. Viramitrodaya (Gopal Chandra Sarkar's translation) page 202 : *Jagannath Pal v. Bidyanand* (1), and *Khoderam Chatterji v. Rookhinee Boistobee* (2). It was also contended that if Gopal Das were held to be an ascetic, the rules of inheritance governing the succession to the property of an ascetic were applicable only to the requisites of his austerities and not to any other property ; and that consequently those rules were not applicable in this case, but the ordinary rules of inheritance should be applied.

"It was not contended for the plaintiff that Gopal Das was a 'hermit' or 'ascetic,' but that the plaintiff as the chela of Gopal Das, was entitled to succeed to his property. The Subordinate Judge says that, although Gopal Das was not a 'sanyasi,' the ordinary rules of inheritance are not applicable, and cannot be applied to a person of the order of 'bairagis' to which Gopal Das belonged. Such a person, he says, severs his connection with his kindred as soon as he enters the order. His father is his 'guru' (spiritual guide) and his 'son' is his 'chela' or disciple. Such a person is permitted to acquire property not for personal use, but for his deity.

The general rule of Hindu Law is that sons and grandsons take the heritage, or on failure of them, the widow or other successors. The exception relates to professed students, hermits, and ascetics. The heir of the first is the preceptor, that of the second the spiritual brother and associate in holiness, and that of the third, the virtuous pupil. 'No one,' says Mr. Mayne in his work on Hindu Law, 'can come under the above heads for the purpose of introducing a new rule of inheritance, unless he has absolutely retired from all earthly interests, and, in fact, become dead to the world.' The Subordinate Judge appears to think that if a man severs his connection with his kindred, and joins a religious order, a new rule of succession is introduced in respect of his property ; I think, that he is wrong. Unless a Hindu is a 'hermit' or an 'ascetic' the property which he leaves undisposed of which was his own absolutely, will devolve upon his secular heirs, notwithstanding that he may have severed his connection with his kindred and entered a religious order, and has become a "*guru*" or spiritual guide, and has "*chelas*" or disciples. I think, therefore, that although the plaintiff was Gopal Das' *chela* he is not entitled to succeed to the property of Gopal Das, Gopal Das not being a "hermit" or "ascetic." As Gopal Das' successor to the office of *mahant*, the plaintiff can only succeed to the property, which Gopal Das held as *mahant*. The mortgagee's interest in the mortgage, not being the property of the idol, was not so held. The plaintiff consequently is not entitled to the mortgagee's interest in the mortgage as his successor of Gopal Das."

On this appeal, which was heard *ex parte*,

(1) (1868) 1 B. L. R., A. C., 114 ;  
10 W. R., 172.

(2) (1871) 15 W. R., 197.

1905

BISHAMBHAR  
DAS  
v.  
DRIGBIJAI  
SINGH.

1905

BISHAMBHAR  
DAS  
v.  
DEGIBHAI  
SINGH.

*W. C. Bonnerjee* and *K. W. Bonnerjee* for the appellant contended that the Court of the Judicial Commissioner was in error in holding that the appellant was not entitled to succeed to his property as the heir of Gopal Das, nor to maintain the suits in that capacity and as trustee of the idol endowed by him. The money advanced on the security of the mortgages was the money of the idol Sri Raghu Nathji, the interest of Munnu Singh in the mortgage of 7th January 1890 having been duly transferred to the idol, and was repayable to his trustee and manager. The appellant was the heir of Gopal Das as regarded all the property of which he died possessed. The succession to the property of a Mahant was regulated not by the Hindu Law but by custom. The custom in this case was stated in the *wajib-ul-arz* of the Fyzabad district of Oudh (1) and the appellant as the chela of Gopal Das was duly nominated to succeed him as mahant, and was appointed and installed as his successor in accordance with the custom stated in the above document. Reference was made to Shama Charan Sarkar's *Vyavastha Chandrika* (edition of 1878, Calcutta), Vol. I, page 221 and the authorities there cited. A chela was the heir of a deceased mahant and as such entitled to a certificate to enable him to collect the mahant's debts. See *Sheoproskash Doss v. Joyram Doss* (2). The cases of *Genda Puri v. Chatar Puri* (3); and *Bhagaban Ramanuj Doss v. Ram Praparna Ramanuj Dass* (4) were also referred to.

The mortgagee not having been put into possession of the property as stipulated was entitled to interest as given by the mortgages on the money advanced as decreed by the Subordinate Judge, whose decree was correct and had been wrongly reversed by the Court of the Judicial Commissioner.

1905, *June 29th*—The judgment of their Lordships was delivered by SIR ANDREW SCOBLE—

In the suits upon which these appeals are founded, the plaintiff (who is now the appellant) sues as "disciple and successor" of Mahant Gopal Das, trustee and manager of Sri

(1) Ante p. 584, note.

(2) (1866) 5 W. R., Misc., 57.

(3) (1886) L. R., 13 L. A., 100 (105);  
I. L. R., 9 All., 1 (8).

(4) (1894) L. R., 22 L. A., 94; I. L. R., 22 Cal., 843.



1905

BISHAMBHAR  
DAS  
v.  
DRIGBIJAI  
SINGH.

Raghu Nathji, of the Raj Gopal temple at Ajudhia, in the district of Fyzabad, in the Province of Oudh, to recover from the respondent Thakur Drigbijai Singh the amount due under two mortgages executed by him. The first of these mortgages is dated the 7th day of January 1890 and relates to a sum of Rs. 20,000, whereof Rs. 15,000 was borrowed from Gopal Das, and Rs. 5,000 from another person whose interest the plaintiff subsequently acquired. The second bears date the 10th of January 1890 and relates to a further sum of Rs. 4,000 borrowed from Gopal Das. In both documents the lender is described in practically the same language as Mahant Gopal Das, trustee and manager of the Raj Gopal temple of Sri Raghu Nathji at Ajudhia, and zamindar of Taluka Agar Buzurg." The respondent Thakur Drigbijai Singh, who is the first defendant upon the record, does not deny the execution of the mortgages or his liability under them, but he disputes the plaintiff's title to sue upon them. The Subordinate Judge passed decrees in both suits in favour of the plaintiff, but they were reversed on appeal by the Judicial Commissioners.

The facts are simple and of a character not unusual in India. Gopal Das, as both Courts below have concurred in finding, was the mahant of an order of bairagis, or religious mendicants, and in that capacity was trustee and manager of certain temples at Ajudhia, dedicated to the worship of Vishnu under the name of Sri Raghu-Nathji. He appears to have been a man of considerable property, a zamindar and a money lender, and had built one of these temples, called the Raj Gopal temple, at his own expense. The plaintiff was one of his *chelas* or disciples and, as a matter of fact, succeeded him as mahant; but it is unnecessary for their Lordships to determine what rights of property he thereby acquired, as Gopal Das before his death executed a *tambiknama*, or deed of endowment, by which he not merely designated his successor in the mahantship, but also provided for the maintenance of certain property which he dedicated to the service of the temples and the worship of the idol.

By this deed, dated the 13th February 1889, Gopal Das, after reciting that he had retired from the world and was

1905

BISHAMBHAR  
DAS  
v.  
DRIGBIJAI  
SINGH.

leading a life of celibacy, always engaged in the worship of Sri Raghu Nathji, and spending all he earned by labour in good and charitable works; and after setting out particulars of the temples under his management and trusteeship went on to say:—

“Now it is my heartfelt and sincere desire that after my death the good and charitable work be continued in future by means of my property; that all the property granted by Sri Raghu Nathji be after me employed, as usual, in the worship of Sri Raghu Nathji and other charitable works . . . therefore, cancelling my former will . . . I do hereby execute a *tambiknama*” (or deed of endowment) “of my entire *Ilaka* . . . called Agar Buzurg, and valued at Rs. 74,000 . . . and which is my own self-acquired property, owned and occupied by me without the intervention of any other person, as follows:—

“1. I make a *waqf* of all these villages in the name of Sri Raghu Nathji of the Raj Gopal temple situate at Ajudhia . . .

“2. During my life I shall myself manage and deal with all these villages as a trustee and manager, the income and profits being appropriated in the worship of Sri Raghu Nathji as detailed below . . .

“8. After my death one Bishambhar Das, my disciple, shall be the trustee and manager, provided that I may not have during my life-time made any change by nominating any other person . . .”

Gopal Das died on the 20th October 1892, without having nominated any other trustee in the place of the plaintiff. After some litigation, the plaintiff was installed as his successor in the mahantship, and on the 10th March 1893, on the application of the plaintiff, the Agar Buzurg estate was recorded in the Revenue Register as the property of Sri Raghu Nathji, under the management and trusteeship of the plaintiff “in the same *ilaka* in which the deceased (Gopal Das) was in possession.”

The learned Judicial Commissioners held, and their Lordships are disposed to agree with them, that “there is nothing

in the deed of endowment to indicate that Gopal Das created a trust in respect of any property except the Agar Buzurg Estate." There is evidence that it was the intention of Gopal Das to dedicate all his property to the service of the deity, but it is not necessary to refer to this, as their Lordships consider that the evidence shows that the money lent to the first defendant was part of the profits of the Agar Buzurg Estate which had undoubtedly been so dedicated. Madari Lal and Bhim Sen both appear to be trustworthy witnesses who had means of knowledge of these transactions and whose testimony is not in any way impeached or contradicted. Their Lordships agree with the Subordinate Judge in holding that it has been proved "that the money advanced to the defendant No. 1 belonged to Sri Thakurji as receipts from the endowed *ilaka*." And as the appellant was appointed by Gopal Das to succeed, and did in fact succeed him as trustee and manager of the temple property under the deed of endowment above referred to, their Lordships consider that as such trustee and manager he is entitled to maintain these suits and to recover the moneys due by the defendant Thakur Drigbijai Singh to the trust estate under the mortgages.

The respondents were not represented before their Lordships at the hearing of these appeals, but in the Subordinate Court it was one of the grounds of the first defendant's appeal that he ought not to have been charged with interest at the rate of 2 per cent. per month, and that this rate was penal and unconscionable. The Subordinate Judge held that this rate was chargeable in the event of possession not being given to the mortgagee as stipulated in the bond, and that the mortgagor not only failed to give possession, but on the 8th October 1891 wrote a letter to Gopal Das in which he said:—"I shall not deliver possession to you, but will repay the money advanced by you according to the terms of this deed." In fact the first defendant appears to have been long in possession of the mortgaged property and to have received the profits and produce thereof, and their Lordships see no reason to interfere with the Subordinate Judge's decrees on this point.

1905

---

RISHAMBHAR  
DAS  
v.  
DRIGBIJAI  
SINGH.

---

1905

BISHAMBHAR

DAS

v.

DRIGBIJAI

SINGH.

Their Lordships will humbly advise His Majesty that the appeals in both cases ought to be allowed, and that the decrees of the Judicial Commissioners ought to be set aside with costs and the decrees of the Subordinate Judge restored. The respondent Thakur Drigbijai Singh must pay the costs of these appeals including the costs of the appellant's interlocutory petition for addition of parties and consolidation.

*Appeals allowed.*

Solicitors for the appellant—*Young, Jackson, Beard and King.*

J. V. W.

1905

April 4.

## APPELLATE CIVIL.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice*

*Sir William Burkill.*

RADHA KRISHNA DAS AND OTHERS (PLAINTIFFS) v. THE MUNICIPAL BOARD OF BENARES (DEFENDANTS).\*

*Act No. XV of 1883 (N.-W. P. and Oudh Municipalities Act), section 40—Act (Local) No. I of 1900, section 47—Act No. IX of 1872 (Indian Contract Act), sections 65, 70 and 72—Municipal Board—Contract—Contract not executed in manner prescribed by law—Part performance—Right of Board to repudiate.*

Where a contract with a Municipal Board, which, according to section 40 of Act No. XV of 1883 and section 47 of Local Act No. I of 1900 must be executed in a particular form, has not been so executed, no suit can be maintained against the Municipal Board in respect thereof, notwithstanding that there has been part performance of the contract and the plaintiff is claiming merely for the value of work done and of materials supplied. *Young & Co. v. The Mayor & Corporation of Royal Leamington Spa* (1) and *British Insulated Wire Co. v. The Prescott Urban District Council* (2) followed. *Abaji Sitaram Modak v. The Trimbak Municipality* (3) *quoad hoc* dissented from.

The plaintiffs, proprietors of a firm of contractors of Benares, brought the suit out of which this appeal has arisen against the Municipal Board of Benares to recover from the defendants Rs. 1,800 the price of stone ballast supplied and Rs. 500 damages for breach of contract, with interest.

\* First Appeal, allowed, 11th of 1903, from a decree of J. Sanders, Esq., District Judge of Benares, dated the 10th of November 1902.

(1) (1883) L. R., 8 App. Cas., 517.

(2) L. R., 1895, 2 Q. B. D., 463.

(3) L. L. R., (1903) 28 Bom., 66.

and costs. The plaintiffs' case was that by his letter No. 2152 of the 6th September 1899, the Resident Engineer of the Benares Municipal Board contracted with them to take, at the rate of Rs. 7-8-1 per 100 cubic feet, 118,186 cubic feet of stone ballast for metalling the Municipal roads. They supplied 29,032 cubic feet of ballast, for which they were paid at the rate agreed. They stacked 32,100 cubic feet of ballast at the Maidagin road and 6,000 cubic feet at Dassassumedh ghat. The Resident Engineer arbitrarily appropriated the entire quantity of 32,100 cubic feet and fixed the same at 26,100 cubic feet, and refused to accept delivery of the remainder of the ballast which the plaintiffs had got ready, and did not allow them to perform the rest of the contract, whereby the plaintiffs suffered a loss of Rs. 570-8-0. Also out of the price of the 32,100 cubic feet of ballast the defendants paid only Rs. 564-12-6, leaving a balance due of Rs. 1,842-7-2. The defendants pleaded that the contract set up was not binding on the Municipal Board, because the requirements of section 47 of the N.-W. P. and Oudh Municipalities Act, 1900, had not been complied with, there being no contract in writing signed as required by the Act. This was the only issue tried by the Court of first instance. The Court (District Judge of Benares) found that there was no contract in writing as required by section 40 of the former Municipalities Act (No. XV of 1883), during the currency of which the agreement relied on by the plaintiffs had been entered into, and that in consequence of this the suit was not maintainable.\* The suit was accordingly dismissed. From this decree the plaintiffs appealed to the High Court.

Munshi *Gokul Prasad* and The Hon'ble Pundit *Madan Mohan Malaviya*, for the appellants.

Mr. *A. E. Ryves*, for the respondents.

\* *N.B.*—Section 40 of Act No. XV of 1883 and section 47 of the Local Act No. I of 1900 (the present Municipalities Act) are in identical terms. The latter reads:—(1) Every contract made by a Board whereof the value or amount exceeds twenty rupees shall be in writing. (2) Every such contract shall be signed by the chairman, a vice-chairman, and a secretary: \* \* \* (3) If a contract to which this section applies is executed otherwise than in conformity therewith, it shall not be binding on the Board."

1905

RADHA  
KRISHNA  
DAS  
v.  
THE  
MUNICIPAL  
BOARD OF  
BENARES.

1905

RADHA  
KRISHNA  
DAS  
v.  
THE  
MUNICIPAL  
BOARD OF  
BENARES.

STANLEY, C.J. and BURKITT, J.—The question for determination in this appeal is whether a suit can be maintained for materials over the value of Rs. 20 supplied to a Municipal Board which is subject to the provisions of the North-Western Provinces and Oudh Municipalities Act of 1883, in the absence of a contract in writing and signed by the Chairman or a Vice-Chairman and Secretary of the Municipality. The Municipal Board of Benares invited tenders for road ballast, whereupon the plaintiffs made a tender which was approved of by the Resident Engineer and was subsequently accepted by resolution of the Board. The plaintiffs acting on the resolution of the Board supplied some ballast, for which payment was made. A further instalment of ballast was supplied, a part of which the Municipality refused to accept as being of inferior quality. The plaintiffs then brought the suit out of which this appeal has arisen, claiming the value of this ballast. The defendant Board set up the defence that the contract was not binding on them inasmuch as the requirements of section 47 of the North-Western Provinces and Oudh Municipalities Act, No. I of 1900, were not complied with. This section corresponds with section 40 of the Act of 1883. In their written statement the Board expressed their willingness to pay to the plaintiffs Rs. 1,094-8-8, the price of the ballast actually used after deducting the cost of picking and sorting. This sum the Board subsequently deposited in Court, and it was withdrawn by the plaintiffs. The Court below dismissed the suit as not maintainable, and hence the present appeal.

Mr. *Ryves*, counsel on behalf of the Municipality, based the defence of the Board mainly on the ruling of the House of Lords in the case of *H. Young & Co. v. The Mayor and Corporation of Royal Leamington Spa* (1) affirming the judgments of the Court of Appeal and a Bench of the Queen's Bench Division. The appellants rely upon sections 69, 70 and 72 of the *Contract Act* as taking the case out of the ruling of the House of Lords. Section 40 of the Municipalities Act of 1883 provides that (1) "every contract made by or on behalf of a Municipal Board, whereof the value or amount

1905

RADHA  
KRISHNA  
DAS  
v.  
THE  
MUNICIPAL  
BOARD OF  
BENARES.

exceeds Rs. 20, shall be in writing; (2) every such contract shall be signed by the Chairman or a Vice-Chairman and the Secretary; and (3) if a contract to which this section applies is executed otherwise than in conformity therewith it shall not be binding on the Board."

The case of *Young & Co. v. The Mayor and Corporation of Royal Leamington Spa* had reference to section 174 of the Public Health Act of 1875, which imperatively requires that every contract made by an Urban Authority, whereof the value or amount exceeds £50, must be in writing and sealed with the common seal of such authority. In that case the Corporation being an Urban Authority by contract under seal employed a party to construct Water Works, one of the terms of the contract being that if the party employed should make default, the engineer of the Corporation might employ persons to finish it and charge the party employed with the expense. Default was made in the completion of the contract, and thereupon the defendants' engineer by contract in writing employed the plaintiffs, not only to finish the contract, but to execute certain additional works not specified therein. The plaintiffs executed the works and the defendants had the benefit of them. The contract of the engineer with the plaintiffs was approved of by the defendants, but the provisions of section 174 of the Public Health Act were not complied with. A Bench of the Queen's Bench Division consisting of Mathew and Williams, JJ., on a special case stated by an arbitrator held that the contract was not binding on the defendants. On appeal from this decision Lindley, Cotton and Brett, L.JJ., upheld the decision of the Court below (L.R., 8 Q.B.D., 579). Upon the point pressed in argument on behalf of the plaintiffs, that as the contract had been performed and the defendants had the benefit of the plaintiffs' work, labour and materials, the defendants were at all events liable to pay for them at a fair price, Lindley, L. J., observed:—"Of this contention cases were cited to show that persons are liable at Common Law *quasi ex contractu* to pay for work ordered by agents and done under their authority. The cases on this subject are very numerous and conflicting, and they



1905

RADHA  
KRISHNA  
DAS  
v.  
THE  
MUNICIPAL  
BOARD OF  
BENARES.

require review and authoritative exposition by a Court of Appeal. But in my opinion the question thus raised does not require decision in the present case. We have here to construe and apply an Act of Parliament. The Act draws a line between contracts for more than £50 and contracts for £50 and under. Contracts for not more than £50 need not be sealed and can be enforced whether executed or not, and without reference to the question whether they could be enforced at Common Law, by reason of their trivial nature. But contracts for more than £50 are positively required to be under seal; and in a case like that before us, if we were to hold the defendants liable to pay for what has been done under the contract, we should in effect be repealing the Act of Parliament and depriving the rate-payers of that protection which Parliament intended to secure for them." He further observes:—"It may be said that this is a hard and narrow view of the law; but my answer is that Parliament has thought it expedient to require this view to be taken, and it is not for this or any other Court to decline to give effect to a clearly expressed Statute because it may lead to apparent hardship." Brett, L. J., in his judgment said:—"I think that the mere want of seal prevents the plaintiffs from recovering, and I am further of opinion, having read all the cases on the point, that the fact that the defendants had the benefit of the contract will not prevent them from setting up the Statute in answer to the plaintiffs' claim. The mere want of a seal is a complete bar."

On appeal to the House of Lords, Lord Blackburn in the course of his judgment adopted the views expressed by Lindley and Brett, L.JJ., and at the close of his judgment, commenting on the effect of the view entertained by their Lordships, observes:—"It is true that this works great hardship upon the now appellants. They had an agreement, but it was not sealed, and yet it is possible that if the agreement had been under seal the defendants might have established a defence on the merits. For part of what is claimed, it is hard on the appellants that they should not be allowed to raise the question. It is, however, for the Legislature to determine

whether the benefits derived by enforcing a general rule are or are not too dearly purchased by occasional hardships. A Court of law has only to inquire, what has the Legislature thought fit to enact?" Lord Bramwell in expressing his concurrence stated:—"I must add that I do not agree in the regret expressed at having to come to this conclusion. The Legislature has made provisions for the protection of rate-payers, share-holders and others who must act through the agency of a representative body by requiring the observance of certain solemnities and formalities which involve deliberation and reflection. That is the importance of the seal. It is idle to say that there is no magic in the wafer. It continually happens that carelessness and indifference on the one side and the greed of gain on the other cause a disregard of these safeguards, and improvident engagements are entered into. Whether that has been so in this case I have no notion, but certainly the rate-payers of Leamington may well be astonished at the amount claimed of them. The decision may be hard in this case on the plaintiffs, who may not have known the law. They and others must be taught it, which can only be done by its enforcement." Lord Watson and Lord Fitz-Gerald concurred. The case of the *British Insulated Wire Company v. The Prescott Urban District Council* (1) is an exemplification of the stringency with which the Courts enforce the observance of statutory requirements. In that case the plaintiffs and defendants entered into a contract in writing duly sealed with the seal of the defendants, whereby the plaintiffs agreed to light by means of electricity the streets within the defendants' district for a period of five years for the annual sum of £350. The contract, which was otherwise in conformity with the requirements of section 174 of the Public Health Act of 1875 in every respect, omitted to specify any pecuniary penalty to be paid in case its terms were not duly ~~performed~~. The plaintiffs duly performed the contract on the ~~terms~~ would have been entitled to the sums claimed in ~~the contract~~ if the contract had been valid and binding up ~~on the defendants~~ enforceable against the defendants. The question for ~~the~~ decision of the

1905

RADHA  
KRISHNA  
DAS2.  
THE  
MUNICIPAL  
BOARD OF  
BENARES.

(1) L. R., 1895, 2 Q.B.D., 463.

1905

RADHA  
KRISHNA  
DAS  
v.  
THE  
MUNICIPAL  
BOARD OF  
BENARES.

Court was whether the contract was void or not enforceable against the defendants, by reason of the fact that it did not specify a pecuniary penalty to be paid in case of its breach. It was held by Pollock, B., and Wright, J., that the enactment was obligatory, and that a contract which did not specify any pecuniary penalty could not be enforced against the Urban Authority. To these decisions we naturally attach profound weight. But they are met by the contention of the learned vakil for the appellants in this case that in view of the provisions of section 65, 70 and 72 of the Indian Contract Act they have no application in the circumstances of the present case. Before we deal with this contention it will be convenient here to refer to a decision of a Bench of the Bombay High Court upon which the learned vakil for the appellants strongly relied, that is the case of *Abaji Sitaram Modak v. The Trimbak Municipality* (1). In that case the plaintiff Municipality brought a suit to recover a sum of money from the defendants alleging that it was due from the principal defendant as the person to whom the right of levying and collecting certain tolls and taxes had been granted and from the other defendant as his surety. The defence was that the Municipality had at a meeting passed a resolution, which was subsequently communicated to the principal defendant, which had the effect of dispensing with or remitting the performance by him of so much of his obligations as gave rise to the suit. The surety relied on the provisions of Chapter VIII. of the Indian Contract Act as entitling him to a discharge from liability. By the resolution upon which the defendants relied it was resolved that, taking into consideration adverse circumstances, such as the prevalence of plague, famine, cholera and other things, and the fact that the principal defendant was likely to suffer loss, it was proper to remit Rs. 7,000, and that that sum should be remitted. The sum agreed to be paid by the principal defendant. A resolution was passed by the Chairman and five members. Neither the President nor any official member was present at the meeting, and it was subsequently set aside at a general meeting, at which it was held unanimously that the

1905

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RADHA  
KRISHNA  
DAS  
v.  
THE  
MUNICIPAL  
BOARD OF  
BENARES.

resolution should be cancelled. On behalf of the plaintiff Municipality it was contended that there had been no remission or dispensation within the meaning of section 63 of the Contract Act, first, because there was no communication of the resolution, and, secondly, because the provisions of section 30 of the Bombay Act II of 1884 had not been observed. It was contended that a dispensation or remission under section 63 requires an agreement or contract in view of the provisions of section 30 of that Act. That section provides that "every other contract or agreement (*i.e.*, any contract or agreement the amount or value of which exceeds Rs. 500) on behalf of a Municipality shall be in writing and shall be signed by the President and two other Commissioners and shall be sealed with the common seal of the Municipality." It was held by Jenkins, C.J., and Jacob, J., that the meeting at which it was resolved to grant remission to the principal defendant had not been duly convened in the manner prescribed by section 27 of the District Municipal Act, and further that, assuming that there was a legal resolution and that it was communicated as alleged, still, inasmuch as a dispensation or remission under section 63 requires an agreement or contract, the resolution was of no legal effect since the provisions of section 30 had not been observed. So far this judgment is unfavourable to the appellants. But in the course of their judgment the learned Judges referred to a point which was raised by the Advocate-General before them for the first time, and then only as the result of an investigation made in the course of the hearing before them. It appeared that the contract under which the principal defendant became entitled to levy and collect the tolls was not under seal and so failed to comply with section 30, to which we have alluded. The Advocate-General, relying on section 23 of the Indian Contract Act, asked the Court to hold that there was no contract at all under which the plaintiff Municipality could claim. The Court dealt with this argument in the following passage:—"Apart from the fact that this is a contract outside the pleadings of the parties, we think there is another reason why we cannot give effect to the contract. It is well recognised law in England that though a contract by a

1905

RADHA  
KRISHNA  
DAS  
! v.  
THE  
MUNICIPAL  
BOARD OF  
BENARES.

corporation must ordinarily be under seal, still, where there is that which is known as an executed consideration, an action will lie, though this formality has not been observed. Notwithstanding section 23 of the Indian Contract Act, we see no reason for not adopting the same view of the law here. For we think when regard is had to the principle on which the English Courts have proceeded, it is clear we do not run contrary to any provision of section 23 of the Contract Act in holding that in this country too, as in England, where there is an executed consideration, a suit will lie even in the absence of a sealed contract. And on the facts of this case we hold that there has been an executed consideration. It is, however, at the same time manifest that the doctrine we have here applied will, on the facts, in no way assist the defendant's contention that the performance of his promise had been legally dispensed with or remitted." Section 23 of the Contract Act is the section which prescribes that the consideration or object of an agreement is lawful unless, among other things, it is forbidden by law or is of such a nature that if permitted it would defeat the provisions of any law. We think that the statement of the law thus laid down is too wide. According to the ruling of the House of Lords, to which we have referred, an action will not lie in England against a Corporation which is governed by an Act such as the Public Health Act of 1875 in the absence of a sealed contract, even though there is an executed consideration. In view of the prohibition contained in section 30 of the Act to which we have referred, that no contract or agreement not executed as therein provided should be binding on a Municipality, the contract entered into with the defendants was not, we think, enforceable, at all events as against the Municipality, even though there was an executed consideration. Apart from sections 65, 70 and 72 of the Indian Contract Act, it appears to us that a contract entered into between the appellants and the Municipality not having been committed to writing as required by the Municipalities Act cannot form the basis of any suit against the Municipality, notwithstanding that ballast was supplied in pursuance of it.

1905

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RADHA  
KRISHNA  
DAS  
v.  
THE  
MUNICIPAL  
BOARD OF  
BENARES.

But sections 65, 70 and 72, which have been relied upon by the learned vakil for the appellants, we think, afford him no assistance. As regards section 65 it seems to be applicable to cases in which an agreement is void by reason of mistake or impossibility, or in consequence of the want of a legal consideration. The illustrations annexed to the section point to this. The section opens with the words:—"When an agreement is discovered to be void or when a contract becomes void," and applies only to such cases. As an illustration of the cases in which an agreement is discovered to be void the following is given:—"A pays B Rs. 1,000 in consideration of B's promising to marry C, A's daughter. C is dead at the time of the promise. The agreement is void, but B must repay A Rs. 1,000." Here the parties entered into an agreement in the mistaken belief that C was alive, and there was a total failure of consideration for the payment of the Rs. 1,000. In the case before us the agreement entered into between the appellants and the respondent Municipality was not discovered to be void. There was no illegality in the action of the Municipality in passing a resolution accepting the appellants' tender, and therefore it cannot be said that the agreement, if any, constituted by the tender and acceptance of it, has been discovered to be void. The agreement is unobjectionable, but it did not ripen into a binding contract by reason of the neglect of the parties to comply with the provisions of the section under which the Municipality could alone contract. The subsequent words of the section, namely, "when a contract becomes void" evidently have no application because there was no contract. If we were to hold that this section was applicable, we should render nugatory the salutary provision of the Municipalities Act which provides that "a contract executed otherwise than in conformity with it shall not be binding on the Board." Likewise section 70 appears to us to have no application. Section 70 provides that where a person lawfully does anything for another person or delivers anything to him not intending to confer a gratuitous benefit on the person enjoying the benefit of the thing done or delivered, but to restore the thing so done or delivered. Assuming, but

1905

RADHA  
KRISHNA  
DAS  
v.  
THE  
MUNICIPAL  
BOARD OF  
BENARES.

without deciding, that this section has any application, we find that the appellants cannot be said to have lawfully delivered to the Municipality the ballast which the Board has not used. The plaintiffs, without any legal contract authorizing them in that behalf, chose to lay down ballast on the side of a public road. That ballast has not been used by the Municipality save to the extent for which the price, *viz.*, Rs. 1,094-8-8 has been paid to the appellants, that is, the sum lodged in Court and drawn out by the appellants. The Municipality has not enjoyed the benefit of the remainder of the ballast. The section nowhere imposes on a party any obligation to make compensation in respect of that of which he has not enjoyed the benefit. Section 72 also does not appear to us to help the appellants. It provides that a person to whom money has been paid, or anything delivered by mistake or under coercion must repay or return it. The ballast in this case was neither delivered by mistake nor under coercion.

For these reasons we think that the decision arrived at by the Court below was correct. We therefore dismiss the appeal with costs.

*Appeal dismissed.*

1905  
April 6.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice  
Sir William Barkitt.*

AUSERI LAL AND OTHERS (DEFENDANTS) v. RAM BHAJAN LAL AND  
OTHERS (PLAINTIFFS). \*

*Pre-emption—Wajib-ul-arz—Construction of document—Partition of village  
into separate mahals—Provisions of existing wajib-ul-arz as to pre-  
emption copied verbatim into wajib-ul-arzes of new mahals.*

Where on partition of a village into two separate mahals the provisions of a former wajib-ul-arz, which recorded a custom of pre-emption as existing in favour of, amongst others, "co-sharers in the village," were copied *verbatim* into the wajib-ul-arz of each of the new mahals, it was *held* that the effect of this was to give to the co-sharers in each of the new mahals rights of pre-emption. A "village" (*gaon, mauza or deh*) is not the same thing as a *mauza* and must not be confounded therewith; nor does the breaking up of a village into separate mahals of necessity destroy all the

\* First Appeal No. 276 of 1902 from a decree of Babu Bipin Bohari Mukerji, Subordinate Judge of Cawnpore, dated the 9th September 1902.



existing rights as to pre-emption of the co-sharers in the village. *Gokal Singh v. Mannu Lal* (1), *Mata Din v. Mahesh Prasad* (2), *Ghure v. Man Singh* (3) and *Dalganjan Singh v. Kalka Singh* (4), referred to.

THIS was a suit for pre-emption of certain shares in various villages, and arose out of the following circumstances. At the time of the last revision of settlement each of three villages, namely, Anti, Dhundar and Phalra formed a separate mahal. A fourth village named Lalipur consisted of three mahals. Phalra still continues as one entire mahal. After the last revision of settlement there was a perfect partition of the villages Anti, Dhundar and Lalipur, whereupon one of the three mahals in mauza Lalipur was divided into three mahals, namely, Mahal Maniar Singh, Mahal Sheo Charan Lal and Mahal Ram Charan Lal. The plaintiffs became the owners of the entire Mahal Sheo Charan Lal, and the defendant Maniar Singh of the entire Mahal Maniar Singh. In mauzas Anti and Dhundar the plaintiffs are co-sharers in Mahal Hukum Singh, while the defendant Maniar Singh is the sole proprietor of Mahal Dal Kuar. The plaintiffs were before partition admittedly co-sharers with the defendant Maniar Singh in the four villages, but since partition they are not co-sharers in any of the new mahals in which the property, the subject-matter of the suit, is situate. This property was sold by Maniar Singh to the defendants 2—4, who are strangers, and it is this sale which the plaintiffs seek to pre-empt. At the time of partition a new wajib-ul-arz was prepared for each of the new mahals, but these wajib-ul-arzes record the custom of pre-emption as it previously existed: they are in fact verbatim copies of the old wajib-ul-arzes of the villages before partition. In the case of Mahal Musammat Dal Kuar in mauza Anti the new wajib-ul-arz thus describes the custom:—"When a co-sharer sells his share, it is purchased, first, by a near sharer, then a sharer in the *thok*, then a sharer in the village, then a stranger gets it." In the case of Mahal Musammat Dal Kuar in Dhundar, the new wajib-ul-arz records the custom as follows:—"When a co-sharer wishes to sell his share, then, first, a near sharer, after him a sharer, then a stranger, then a *putti*, then a

1905

AUSERI LAL  
v.  
RAM BHAJAN  
LAL.

(1) (1885) I. L. R., 7 All., 772.  
(2) Weekly Notes, 1892, p. 100.

(3) (1895) I. L. R., 17 All., 226.  
(4) (1899) I. L. R., 22 All., 1.

1905

AUSERT LAL  
v.  
RAM BHAJAN  
LAL.

sharer in the village takes it. When none of these takes it, then a stranger gets it." In the case of Mahal Maniar Singh in mauza Lalipur the custom of pre-emption is thus recorded in the new wajib-ul-arz:—"When a co-sharer sells his share, then, first, a near sharer, and after him a sharer in the village takes it. When none of these takes it, then a stranger gets it." The defendant Maniar Singh having sold the property to a stranger, the plaintiffs claimed the right of pre-emption as being sharers in the villages in which the mahals are situate, portions of which were the subject-matter of the sale. It was admitted that the plaintiffs are entitled to pre-empt the sale so far as regards the portion of property sold which is situate in mauza Phalra, but as regards the residue their claim was resisted on the ground that they were not co-sharers with the vendor in any of the other mahals, shares in which belonged to the defendant Maniār Singh.

The Court of first instance (Subordinate Judge of Cawnpore) held that the case was governed by the decision in the case of *Mata Din v. Mahesh Prasad* (1) and decreed the plaintiffs' claim. He found, however, that the price mentioned in the sale-deed, namely, Rs. 6,500 was fictitious to the extent of Rs. 2,340, and that the true price was Rs. 4,160 only. The defendants vendees thereupon appealed to the High Court.

The Hon'ble Pandit *Sundar Lal*, for the appellants.

Babu *Jogindro Nath Chaudhri*, and Pandit *Moti Lal Nehru* (for whom Pandit *Mohan Lal Nehru*), for the respondents.

STANLEY C.J.—The main question raised in this appeal is one upon which considerable divergence of opinion is to be found in the judgments of this High Court. It arises in a suit for pre-emption brought by the plaintiffs to have an alleged right of pre-emption established under the following circumstances. At the time of the last revision of settlement each of three villages, Anti, Dhundar and Phalra formed a separate village. A fourth village named Lalipur consisted of three mahals. This still continues as one entire mahal. After the last revision of settlement there was a perfect partition

(1) Weekly Notes, 1892, p. 100.

1905

AUSERI LAL

v.  
RAM BHAJAN  
LAL.

of the villages Anti, Dhundar and Lalipur, whereupon one of the three mahals in mauza Lalipur, was divided into three mahals, namely, Mahal Maniar Singh, Mahal Sheo Charan Lal and Mahal Ram Charan Lal. The plaintiffs became the owners of the entire of Mahal Sheo Charan Lal, and the defendant Maniar Singh of the entire of Mahal Maniar Singh. In mauza Anti and Dhundar the plaintiffs are co-sharers in Mahal Hukum Singh, while the defendant Maniar Singh is the sole proprietor of Mahal Dal Kuar. The plaintiffs were before partition admittedly co-sharers with the defendant Maniar Singh in the four villages, but since partition they are not co-sharers in any of the new mahals in which the property, the subject-matter of the suit, is situate. This property was sold by Maniar Singh to the defendants 2—4, who are strangers, and it is this sale which the plaintiffs seek to pre-empt. At the time of partition a new *wajib-ul-arz* was prepared for each of the new mahals, but these *wajib-ul-arzes* record the custom of pre-emption as it previously existed; they are in fact *verbatim* copies of the old *wajib-ul-arzes* of the villages before partition. In the case of Mahal Musammat Dal Kuar in mauza Anti the new *wajib-ul-arz* thus describes the custom:—"When a co-sharer sells his share, it is purchased, first, by a near sharer, then a sharer in the *thole*, then a sharer in the village, then a stranger gets it." In the case of Mahal Musammat Dal Kuar in mauza Dhundar, the new *wajib-ul-arz* records the custom of pre-emption as follows:—"When a co-sharer wishes to sell or mortgage his share then, first, a near sharer, after him a sharer in the *patti*, then a sharer in the village takes it. When none of these takes it, then a stranger gets it." In the case of Mahal Maniar Singh in mauza Lalipur the custom of pre-emption is thus recorded in the new *wajib-ul-arz*:—"When a co-sharer sells his share, then, first, a near sharer, and after him a sharer in the village takes it. When none of these takes it, then a stranger gets it." The defendant Maniar Singh having sold the property to strangers, the plaintiffs claimed the right of pre-emption as sharers in the villages in which the mahals are situate, some of which were the subject-matter of the sale. It is admitted that the plaintiffs are entitled to pre-empt the sale so far as regards the

1905

AUSERI LAL  
v.  
RAM BILAJAN  
LAL.

portion of property sold which is situate in mauza Phalra, but as regards the residuo their claim is resisted on the grounds that they were not co-sharers with the vendor in any of the other mahals, shares in which belonged to the defendant Maniar Singh.

The learned Subordinate Judge held that the case was governed by the decision in the case of *Mata Din v. Mahesh Prasad* (1) and decreed the plaintiffs' claim. He found, however, that the price mentioned in the sale-deed, namely, Rs. 6,500 was fictitious to the extent of Rs. 2,340, and that the true price was Rs. 4,160 only. From his decree this appeal has been preferred.

The appellants have raised before us the contention (1) that the plaintiffs, not being co-sharers in any of the mahals in which the property is situate, are not entitled to pre-empt the sale, save in regard to the portion which is situate in mauza Phalra, and (2) that the true amount of the purchase money was Rs. 6,500; and if the plaintiffs are entitled to pre-empt the sale, they must pay this amount.

The plaintiffs respondents' case is that, though they are not co-sharers in the mahals in question, they are co-sharers in the *gaon* or village, and as such belong to the last class of pre-emptors mentioned in the new as well as the old *wajib-ul-arzes*. The defendants appellants contend that the word *gaon*, or village, as used in the new *wajib-ul-arzes* ought to be construed as equivalent to mahal, and therefore the plaintiffs had no pre-emptive rights. They further contend that each new *wajib-ul-arz* is evidence of a contract entered into between the co-sharers in each new mahal, and that the plaintiffs being no parties to the *wajib-ul-arzes* of the mahals in question, cannot take advantage of or sue upon such contract.

I shall first deal with the last mentioned contention. There appears to me no ready answer to it, namely, that the new *wajib-ul-arzes* do not record a contract but a pre-existing custom which parties desired to perpetuate. The old *wajib-ul-arzes* record a right of pre-emption existing by custom, and the new *wajib-ul-arzes* recorded the determination of the

1905

AUSERY LAL  
v.  
RAM BHAJAN  
LAL.

old proprietary body to retain the old custom notwithstanding the disintegration of the villages for fiscal purposes. If the right intended to be recorded in the new wajib-ul-arzes were a right springing from contract, it would not be properly described in the wajib-ul-arzes as it has been, namely, as *custom*. As Strachey, C.J., observed in the case of *Dalganjan Singh v. Kalika Singh* (1):—"When a Settlement Officer records a custom of pre-emption in the wajib-ul-arz of a new mahal created by perfect partition of an old one, what is that custom? It cannot be something absolutely new, or the word custom would be a misnomer. It must therefore be something which existed before the new mahal and before the partition, something therefore which existed in the time of the old mahal, which has survived the partition and which is recognized as still applicable within the new mahal. In one of the cases cited to us, and no doubt in many other cases, the Settlement Officer simply copied *verbatim* in the new wajib-ul-arz the pre-emption clause of the old one. This implies that the old custom thus continued is regarded as a custom of the co-sharers still applicable to all who, notwithstanding the partition, stand in the relation of co-sharers,—not a custom necessarily confined to co-sharers while members of the coparcenary body of the old and undivided mahal." In this view I entirely concur. From the fact that all the members of the coparcenary body of each of the old undivided mahals accepted on partition the pre-emption clauses contained in the old wajib-ul-arzes, it is manifest, I think, that their intention was to keep in force the old custom. The present case appears to me to be on all fours with the case of *Maha Din v. Mahesh Prasad* (2), which was decided by Mahmood, J. In that case where a mauza originally consisting of one mahal was divided by perfect partition into three mahals and a separate wajib-ul-arz was prepared for each of the new mahals, in which was inserted the following clause relating to pre-emption:—"The co-sharers of the mauza, that they pay the proper price, can become pre-emptors. On the transfer of property is made," it was held that the pre-emption was not limited to co-sharers in the mahal in which the property

(1) (1899) I. L. R., 22 All., 9.

(2) Weekly Notes, 1892, p. 100.

1905

AUSERI LAL  
v.  
RAM BHAJAN  
LAL.

sold was situate. There is no force therefore, in my opinion, in the contention that the plaintiffs are not in a position to take advantage of the provisions of the new wajib-ul-arzes.

This leads me to the consideration of the true construction of the clauses as regards pre-emption in the new wajib-ul-arzes. In clear and unequivocal terms the right of pre-emption is given to sharers in the *gaon* or village. Now whether the word denoting village is the Hindi word *gaon*, or the Arabic word *mauza*, or the Persian word *deh*, there is no ambiguity about it. It means a village and not part of a village, or a mahal in a village. In Wilson's Glossary "*mauza*" is defined as "one or more clusters of habitations and all the lands belonging to their proprietary inhabitants: a mauza is defined by authority to be a parcel or parcels of lands having a separate name in the revenue records and of known limits." In the case of *Gokal Singh v. Mannu Lal*, (1) Petheram, C.J., and Mahmood, J., held that the term 'village,' as used in a wajib-ul-arz, meant a definite area of land with houses upon it, and does not necessarily imply a joint ownership of such land, inasmuch as after partition there may remain some community of interests and things held and used in common by all the inhabitants. Every one who lives in that area has a share in it and therefore may be regarded as a shareholder within the meaning of the wajib-ul-arz. In that case it was contended that after perfect partition the whole of the inhabitable and cultivable area of the village being absolutely divided and the joint ownership of the shares determined, there ceased to be any entire thing which could be called a village in the sense in which the term was used in the wajib-ul-arz, for the reason that each of the original co-sharers was the owner of a separate property. The contention was properly, in my opinion, rejected. A village does not cease to exist by reason of the sub-division of its area for fiscal purposes into separate mahals. In the case of *Mata Din v. Mahesh Prasad* (2) Mahomed is judgment says:—"I cannot interpret the word 'mauza' in other than mauza. I cannot limit it by saying it means a mahal, because I am aware that there may be a mahal including many mauzas. There may be

(1) (1885) I. L. R., 7 All. 772.

(2) (1895) I. L. R., 17 All. 220.

1905

AUSERT LAL  
v.  
RAM BHAJAN  
LAL.

a mauza including more than one mahal, as in this very case. The two terms mauza and mahal are not convertible, and so long as the wajib ul-arz is explicit no reason is shown against its ordinary meaning. I understand a mauza to mean a mauza and a mahal to mean a mahal, and will not depart from the safe rule of interpretation by holding otherwise in the present case that the word 'mauza' only means a 'mahal.' In the case of *Ghure v. Man Singh* (2) my brother Knox passed the following comment upon the decision in *Mata Din v. Mahesh Prasad*:—"This was one of those cases in which the village record of custom prepared after partition was a *verbatim* copy from the record of village customs prepared at the time of settlement. In that case, whether from accident or of design, the record of village custom prepared after the partition conferred in express terms a right of pre-emption upon the co-sharers of the mauza. In that case the word mauza was deliberately used after partition had not only been intended but had been completed and not used as 'doh' has been in the present case when partition was not yet within the horizon." I gather from this that my brother Knox did not disapprove of the ruling of Mahmood J., in the case to which I have referred. The decision of my brothers Blair and Banerji in the case of *Sukhdeo Prasad v. Durga Prasad*, Second Appeal No. 782 of 1902, as yet unreported, is in entire agreement with the decision of Mahmood, J. Finding then no ambiguity whatever in the terms of the new wajib-ul-arzes it appears to me that the Court is bound to construe them according to the plain sense of the words used, and that we ought not to put a construction contrary to the plain sense in view of anything *dehors* the documents. So interpreting the wajib-ul-arzes, the decision of the Court below upon this branch of the case appears to me to be correct, and the plaintiffs are entitled to pre-empt the sale.

It only remains then for me to consider the question of the price which was agreed to be paid for the sale. It appears to me that the finding of the Court upon this question cannot be supported. It is largely based upon the evidence of the patwari Madari Lal, who states that a sum of



1905

AUSERT LAL  
v.  
RAM BHAJAN  
LAL.

money which was handed over before the Registrar, namely, Rs. 2,471 was subsequently handed back to the vendees in the presence of a number of persons. His evidence appears to me to be wholly incredible. It is highly improbable that parties who were engaged in a device to preclude pre-emption by inflating the price would, after handing over money in the presence of the Registrar, immediately take it back in the presence of a number of persons. The allegation is supported by the statement of Madari Lal alone. He deposed that the money was returned in the presence of six persons amongst whom were Gaya Din and Mangli Tiwari. Both Gaya Din and Mangli were examined on behalf of the appellants and both give the lie to Madari Lal saying that the money was not returned in their presence. Mangli says that Maniar Singh took the money and went home along with him. I have no hesitation in coming to the conclusion that the evidence of Madari Lal is untrustworthy. There is no other evidence to support the finding of the Court below. I see no reason for distrusting the evidence afforded by the sale-deed and the witnesses who testify to the payment of the entire consideration mentioned in the deed. I would therefore allow the appeal and modify the decree by increasing the amount to be paid by the plaintiffs on pre-emption from the sum of Rs. 631 to Rs. 2,971 and would extend the time for payment.

BURKITT, J.—Having had an opportunity of perusing the judgment of the learned Chief Justice I have come (though not without some hesitation) to the conclusion that his decision as to the meaning to be given to the words “mauza” or “deh” when used in a wajib-ul-arz is correct.

It is no doubt surprising that when the co-sharers of a mauza have so far intimated their desire, by entering into a perfect partition, to have nothing to do with one another in future, they should still agree to retain a custom of pre-emption by which the ~~parts~~ <sup>parts</sup> of each separated mahal remain entitled to interfere to the extent with transfers of land made by the separated ~~parts~~ <sup>parts</sup> of other mahals which were comprised in the mauza before partition. I have no doubt that in a large number of cases the word “deh” or “mauza” or “gaon” crept

1905

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AUSERT LAT  
v.  
RAM BHAJAN  
LAT.

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into the new wajib-ul-arzes through the ignorance or carelessness of the Settlement Officer's muharrir when copying the wajib-ul-arz of the parent mauza. Nevertheless it appears to me that the current of authority in this Court is conclusive, that in cases of pre-emption between co-sharers of separate mahals which formerly were comprised in one mauza, where the word "mauza" or "deh" or "gaon" is used in connection with the custom, we are bound to give to those words their ordinary meaning and should not hold them to be synonymous with "mahal." I therefore concur with the learned Chief Justice on the question of law raised in this appeal. As to the question of fact I have no doubt that the lower Court went wrong. The grounds on which the learned Subordinate Judge held that the lower price was the true one are unsubstantial in the extreme. The evidence produced for the vendees appellants is in my opinion credible and truthful. It conclusively proves that the larger sum was paid.

For the above reasons I concur in the judgment of the learned Chief Justice and assent to the order he proposes.

BY THE COURT:--The order of the Court is that the decree of the Court below be modified by increasing the amount to be paid by the plaintiffs on pre-emption from the sum of Rs. 631 to Rs. 2,971. In other respects the appeal is dismissed. The time for payment will be extended for a period of six months from to-day. As the appellants have in part failed and in part succeeded in the appeal we make no order as to costs.

*Decree modified.*

1905  
April 17.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice  
Sir William Burdett.*

FAIZ-UN-NISSA (PLAINTIFF) v. HANIF-UN-NISSA AND OTHERS  
(DEFENDANTS).\*

*Act No. I of 1872 (Indian Evidence Act), section 92—Construction of document—Evidence inadmissible to show that a document purporting to be a sale-deed is in reality a deed of gift.*

*Held* that extrinsic evidence is not admissible for the purpose of showing that a document which purports to be, and on the face of it is, a deed of sale is in reality a deed of gift. *Sah Lal Chand v. Indarjit* (1) and *Balkishan Das v. Legge* (2) referred to.

THE plaintiff in this case, Musammatt Faiz-un-nissa, was the owner of a considerable amount of immovable property, yielding an income of some Rs. 24,000 a year. She had two sons, Abdul Ghafur and Abdul Shakur, and two daughters, Musammatt Kulsum and Musammatt Hanif-un-nissa. Abdul Shakur had an only daughter, Musammatt Bashir-un-nissa, and Abdul Ghafur had an only son, Ibrahim Ali Khan. On the 27th of September 1889 Faiz-un-nissa executed a deed which purported to be an out and out conveyance of a portion of her property in consideration of the sum of Rs. 60,000, in favour of her daughter Hanif-un-nissa, her grandson Ibrahim Ali Khan, and her granddaughter Bashir-un-nissa. The sale-deed was in the usual form. It expressed that the vendor, while in a sound state of body and mind, and without compulsion or coercion, had made an absolute sale of the property to the vendees in equal shares for Rs. 60,000. It recited that the sale was lawful, legal, valid, unconditional and irrevocable, and that the whole of the consideration had been received by the vendor. It further stated that the vendees had been put into proprietary possession like the vendor. Lastly, the deed contained a covenant that if the vendees were deprived of possession of any part of the property sold, they would be entitled to recover from the vendor a proportionate part of the sale consideration. On the 5th of September 1901 the vendor filed the present suit, in which she asserted that the sale-deed of the 27th of September 1889 was a fictitious document executed in order to protect her

\* First Assistant No. 37 of 1903 from a decree of Maulvi Maula Bakhsh, Aligarh, dated the 5th of November 1902.

(1) (1900) 1 A. 22 All. 371. (2) (1899) 1 L. R., 22 All. 149.

against the importunities of her son Abdul Shakur. She alleged, as was the fact, that no consideration had ever passed; and she prayed in the alternative for payment of the consideration or for restoration of the property to which the deed in question related, or so much of it as remained in the hands of the defendants. The defendants pleaded that the supposed sale was not in reality a sale at all, but was a gift, though the document evidencing it was in the form of a sale-deed. The Court of first instance (Additional Subordinate Judge of Aligarh) accepted this contention, and accordingly dismissed the suit. The plaintiff thereupon appealed to the High Court.

Babu *Jogindro Nath Chaudhri* and The Hon'ble Pandit *Sundar Lal*, for the appellant.

Sir *Walter Colvin* and Mr. *Abdul Majid*, for the respondents.

STANLEY, C. J., and BURKITT, J.—The only point involved in this appeal is whether or not extrinsic evidence is admissible for the purpose of showing that a document which purports to be, and is on the face of it, a deed of sale is in reality a deed of gift. The plaintiff, Musammat Chaudhrai Faiz-un-nissa, inherited from several relatives a considerable amount of immovable property, representing an income of about Rs. 24,000 a year. She had two sons, namely, Abdul Ghafur and Abdul Shakur, and two daughters, Musammat Kulsum and Musammat Hanif-un-nissa. Abdul Shakur had an only daughter, namely, Musammat Bashir-un-nissa and Abdul Ghafur had an only son, Ibrahim Ali Khan. On the 27th September 1889 the plaintiff executed a deed which purports to be an out and out conveyance of portion of her property in consideration of the sum of Rs. 60,000 in favour of her daughter Hanif-un-nissa and her grandson and granddaughter Ibrahim Ali Khan and Bashir-un-nissa. This is the document which has given rise to this litigation. There is a statement in the deed that the entire consideration had been paid. The grantees under it were at the date of the deed minors. On its execution a registration of names was effected in their favour, but up to the date of the deed the plaintiff continued to manage the property on their behalf. Subsequent to the date of this deed the plaintiff executed deeds

1905

FAIZ-UN-  
NISSA  
v.  
HANIF-UN-  
NISSA.

1905

FAIZ-UN-  
NISSAv.  
HANIF-UN-  
NISSA.

of gift in favour of her daughter and grandson Ibrahim Ali Khan, and she has in fact parted with all her property.

The suit out of which this appeal has arisen was brought by the plaintiff for recovery of possession of the property comprised in the conveyance of the 27th of September 1889, on the ground that the deed was executed by the plaintiff in order to protect herself against the importunities of her son Abdul Shakur Khan, who had become a profligate and spendthrift, and that it was fictitious; and in the alternative for payment of the amount of the consideration money with interest, and that if necessary payment be enforced by sale of the property. As portions of the property comprised in the deed have been sold by the grantees thereunder to several purchasers, to the portions so sold the plaintiff lays no claim in this appeal. Only the property which remains in the hands of the defendants respondents is the subject-matter of the appeal. The defence to the suit is that the transfer of the 27th of September 1889 was made out of natural love and affection, and was in fact a deed of gift, though it took the form of a deed of sale. This defence found favour with the learned Subordinate Judge. He came to the conclusion that the plaintiff never intended to claim payment of the consideration and that the real consideration was natural love and affection. From this decision the present appeal has been preferred. A number of witnesses were examined on behalf of the respondents to prove that the intention of the plaintiff when she executed the deed was to make a gift of the property and not to receive payment of the price. This at once raises the question whether evidence was admissible to prove an unexpressed intention varying from that which the words used in the document imported. On the determination of this question this appeal must succeed or fail. It is admitted by the learned counsel for the respondents that nothing can be elicited from the acts and conduct of the parties after the execution of the deed as their acts and conduct would be as consistent with the deed as vendees as with that of donees. We may observe to this that in all subsequent documents the parties are described as vendees only, and in no way as donees. The distinction between the nature of the deed of

1905

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FAIZ-UN-  
NISSA  
v.  
HANIF-UN-  
NISSA.

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the 27th of September 1889 as a deed of sale and a subsequent deed of gift of the 12th of August 1890 is emphasized. This is a petition which was filed by the plaintiff as certificated guardian of the respondent Ibrahim Ali Khan on the 4th of October 1895 (No. 100C of the record). In that petition there is the statement that the petitioner is the sole zamindar and lambardar of most of the villages sold by the petitioner for consideration and for services rendered to Musammat Hanif-un-nissa, Ibrahim Ali Khan and Musammat Bashir-un-nissa under the sale-deed registered on the 29th of September 1889, and also of all the villages given by the petitioner in gift to Musammat Hanif-un-nissa under the deed of gift registered on the 14th of August 1890 in consideration of the services rendered by her and the said persons have been from the dates of the sale and the gift in exclusive possession and enjoyment of their respective properties, et cetera. The plaintiff in this document draws a clear distinction between the deed of the 29th of September 1889 and the subsequent deed of gift of the 12th of August 1890. Before we deal with the legal question which has been raised, it may be well to refer to the language of the deed of the 27th of September 1889. After a recital of the title of the plaintiff, the plaintiff purports to dispose of the property, using the following words:—"Now I, the executant, while in a sound state of body and mind, have of my own free will and accord, and without the coercion and compulsion of any one, absolutely sold \* \* \* \* \* to Musammat Hanifa \* \* \* Ibrahim Ali Khan \* \* \* and Bashir-un-nissa in equal shares in lieu of Rs. 60,000." Then follows this statement:—"The sale is lawful, legal, valid, unconditional and irrevocable. I received the entire sale consideration aforesaid in full from the vendees aforesaid and brought it to my use and enjoyment. Not a single shell out of the sale consideration entered in this document as payable to me, the executant, remains unpaid by the vendees. I have removed my possession from the aforesaid property sold, specified below, and put the same in proprietary possession of the vendees aforesaid, and made them owners in possession like myself. Now I and my representatives have no claim or right to the property sold and the proceeds thereof"

1905

FAIZ-UN-  
NISSA  
v.  
HANIF-UN-  
NISSA.

At the end of the deed there is a covenant for title which is not consistent with the suggestion that the deed was intended to be a deed of gift. It is as follows:—"If for any reason the whole or a portion of the property sold passes out of the vendees' possession, the vendees shall have power to realize the sale consideration to the extent of the loss from my property in any way they like." If Musammat Faiz-un-nissa had been making a gift of the property it is not likely that she would have bound herself to pay to the donees the value of any of the property of which they might for any cause be deprived.

It is admitted that no portion of the consideration money was paid. If there had been any controversy as to this, evidence would have been admissible to prove that there had been no such payment. Their Lordships of the Privy Council in the case of *Sah Lal Chund v. Indarjit* (1) held it to be "settled law that, notwithstanding an admission in a sale-deed that the consideration has been received, it is open to the vendor to prove that no consideration has been actually paid." "If it was not so," their Lordships add, "facilities would be afforded for the grossest frauds. The Evidence Act does not say that no statement of fact in a written instrument may be contradicted by oral evidence, but that the terms of the contract may not be varied, &c." In admitting evidence to prove that what on the face of it was a sale-deed was really intended to be and was a deed of gift, the Court below has offended against one of the fundamental rules of construction which forbids the admission of extrinsic evidence with a view to setting up an intention inconsistent with the plain meaning of the document itself. Section 92 of the Indian Evidence Act embodies this rule in clear and unequivocal terms. It provides that when the terms of any contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved as required by the preceding section, "no evidence of any oral agreement or statement shall be admitted as between parties to any such instrument, or their representatives in law, to contradict, vary, or add to the meaning of the terms thereof, or to contradict, vary, or add to the effect thereof, for the purpose of contradicting, varying, adding to, or subtracting from its terms." There are some

(1) (1900) I. L. R. 22 All., 371.



1905

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FAIZ-UN-  
NISSA  
v.  
HANIF-UN-  
NISSA.

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exceptions to the rule set forth in the section, but this case clearly cannot be brought within any of these. Sir *Walter Colvin* has suggested that proviso (6) might apply, but he did not press the point. This proviso runs as follows:—"Any fact may be proved which shows in what manner the language of the document is related to existing facts." It manifestly relates to the admissibility of evidence necessary to make the words which are used fit the external things to which the words are appropriate. For example, if lands at a certain place in the grantor's occupation are conveyed by a document, extrinsic evidence is admissible to show what lands were in his occupation. So also if a gift be made to a man's children, extrinsic evidence would be admissible to define who the children were. Other instances might be multiplied. The question before us is really concluded by the decision of their Lordships of the Privy Council in the case of *Balkishen Das v. Leyge* (1). In that case a deed of sale of land for value was accompanied by a deed of agreement between the parties for repurchase by the vendor on payment by him of a sum of money on a future date. The deeds were followed by transfer of possession to the vendee and by his receipt of profits. The vendor did not exercise his right of repurchase, but after a number of years gave notice of his intention to redeem and brought a suit to enforce his right of redemption as upon a mortgage by conditional sale. Evidence of the respondent and of another party was admitted by the Subordinate Judge for the purpose of proving the real intention of the parties, and that evidence was to some extent relied upon in both Courts. Their Lordships laid down that the Courts below were wrong in admitting evidence for the purpose of proving the intention of the parties, and that the case must be decided on a consideration of the contents of the documents themselves. They state in their judgment:—"Their Lordships do not think that oral evidence of intention was admissible for the purpose of construing the deeds or ascertaining the intention of the parties. By section 92 of the Indian Evidence Act (Act I of 1872), no evidence of agreement or statement can be admitted as between parties to

1905

FAIZ-UN-  
NISSA  
v.  
HANIF-UN-  
NISSA.

any such instrument, or their representatives in interest, for the purpose of contradicting, varying, or adding to, or subtracting from its terms, subject to the exceptions contained in the several provisos. It was conceded that this case could not be brought within any of them. The cases in the English Court of Chancery which were referred to by the learned Judges of the High Court have not, in the opinion of their Lordships, any application to the law of India as laid down in the Acts of the Indian Legislature. The case must therefore be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the documents is related to existing facts." In view of this clear statement of the law, it is unnecessary for us to consider the decisions to which we have been referred. The question before us is not one in regard to the admissibility of evidence to show that a recital of fact in a conveyance or contract is erroneous, but of evidence to vary a deed the language of which is plain and unambiguous. We therefore must allow this appeal.

The plaintiff claims recovery of the property, the subject-matter of the deed of conveyance, or in the alternative payment of the price. She clearly is not entitled to enforce her claim for recovery of the property, but she is in our opinion entitled to recover the price. We do not think that this is a case in which we should award her past interest on the purchase money for the past time. We therefore set aside the decree of the Court below and give a decree to the plaintiff for recovery from the defendants of the sum of Rs. 60,000 with interest at the rate of six per cent. per annum from this date, and declare that the plaintiff is entitled to a charge or lien on the property now in the hands of the defendants for the amount decreed. We direct that in default of payment by the defendants of the said sum with interest, within six months from this date, the property in their hands or a sufficient part thereof be sold to satisfy the decree. The defendants must also pay to the plaintiff the costs of this appeal and also the costs in the Court below.

The plaintiff is willing in lieu of a decree for the purchase money to take a re-conveyance of the property remaining in the hands of the defendants respondents at the date of the institution of the suit. We therefore direct that a rider be added to the decree that if within two months from this date the defendants respondents re-transfer the property remaining in their hands at the date of the institution of the suit free from incumbrances created by them or any of them and deliver up possession of the same to the plaintiff appellant, the same shall be accepted as in full satisfaction of the decree, save in respect of the costs hereby awarded to the appellant, and the decree shall not be executed save in respect of costs.

*Appeal decreed.*

1905

FAIZ-UN-  
NISSA

v.  
HANIF-UN-  
NISSA.

*Before Mr. Justice Banerji and Mr. Justice Richards.*

MUNAWAR HUSAIN (JUDGMENT-DEBTOR) v. JANI BIJAI SHANKAR  
AND OTHERS (DECREE-HOLDERS).\*

1905  
April 25.

*Execution of decree—Limitation—Act No. XV of 1877 (Indian Limitation Act), Schedule II, Article 179—Application “in accordance with law”—Application which could not legally be granted—Act No. IV of 1882 (Transfer of Property Act), section 90.*

A decree which was partly a decree under section 88 and partly a decree under section 90 of the Transfer of Property Act, 1882, was passed on the 2nd of December 1885. The decree-holders having brought to sale a portion of the mortgaged property, applied, on the 29th of November 1897, for execution against the non-hypothecated property of the mortgagor. The judgment-debtor objected that this application was premature, as the whole of the mortgaged property had not been sold. This objection was rejected by two Courts, but was allowed by the High Court in second appeal. On the 26th of August 1901 the decree-holders applied for sale of the remainder of the mortgaged property. Held that this application was barred by limitation. *Chattar v. Newal Singh* (1) followed.

THE facts out of which this appeal arose were as follows:—

A decree for sale of mortgaged property was passed on the 2nd of December 1885. The decree further provided that in the event of the proceeds of such sale proving insufficient, the person and other property of the mortgagor would be liable.

\* Second Appeal No. 1081 of 1902, from a decree of F. W. Downrigg, Esq., District Judge of Aligarh, dated the 9th of September 1902, reversing a decree of Maulvi Muhammad Ahmad Ali Khan, Sub-Judge of Aligarh, dated the 23rd of June 1902.

1905

MUNAWAR  
HUSAIN  
v.  
JANI BIJAI  
SHANKAR.

The decree-holders proceeded to execute the decree, and after taking some steps for realizing the amount of it by sale of a part of the mortgaged property, they, on the 29th of November 1897, made an application to the Court for sale of non-hypothecated property. The judgment-debtor objected to that application on the ground that it was premature, the whole of the mortgaged property not having been exhausted. The objection was overruled by the Court of first instance and the lower appellate Court, but it prevailed in the High Court, which held that the decree-holders were not entitled to proceed against non-hypothecated property at that stage, and dismissed the application for execution. On the 26th August 1901 the present application was made for sale of the remainder of the mortgaged property. The Court of first instance (Subordinate Judge of Aligarh) gave effect to the judgment-debtor's objection that execution of the decree was time-barred and dismissed the application. That decision was, however, reversed by the lower appellate Court (District Judge of Aligarh). The judgment-debtor thereupon appealed to the High Court.

Munshi Gokul Prasad (for whom Dr. Satish Chandra Banerji), for the appellant.

The Hon'ble Pandit Sunder Lal, and Pandit Moti Lal Nehru (for whom Pandit Mohan Lal Nehru), for the respondents.

BANERJI and RICHARDS, JJ.—This appeal arises out of an application for the execution of a decree and the only question which we have to determine is that of limitation. The decree was passed on the 2nd of December 1885 for sale of mortgaged property. It further provided that in the event of the proceeds of such sale proving insufficient, the person and other property of the mortgagor would be liable. The decree was thus a combination of decrees under sections 88 and 90 of the Transfer of Property Act. The decree-holder proceeded to execute the decree, and after taking some steps for realizing the amount of it by sale of a part of the mortgaged property, they, on the 29th of November 1897, made an application to the Court, for sale of non-hypothecated property. The judgment-debtor objected to that application on the ground that it was premature,

the whole of the mortgaged property not having been exhausted. The objection was overruled by the Court of first instance and the lower appellate Court, but it prevailed in this Court, which held that the decree-holders were not entitled to proceed against non-hypothecated property at that stage, and dismissed the application for execution. On the 26th August 1901 the present application was made for sale of the remainder of the mortgaged property. The question is whether this application is barred by limitation. It is admittedly barred unless the operation of limitation is saved by the previous application of the 27th of November 1897. If that application was an application in accordance with law it would afford to the decree-holder a fresh start for the computation of limitation. We have therefore to consider whether that was an application in accordance with law within the meaning of article 179 of the second schedule to the Limitation Act. It has been held by this Court in *Chattar v. Newal Singh* (1) that the term "applying in accordance with law" means applying to the Court to do something which by law that Court was competent to do. It does not mean applying to the Court to do something which, either to the decree-holder's direct knowledge of facts or his presumed knowledge of law he knew that the Court was incompetent to do." The same view was held in a recent unreported case, E. S. A. No. 165 of 1902, decided by Mr. Justice Aikman on the 28th of May 1908. The facts of the case last mentioned are very similar to those of the present case. Applying the principle of the rulings to which we have referred, we must hold that the application of the 29th November 1897 was not an application to the proper Court for execution in accordance with law, and consequently that application could not save the operation of limitation. We accordingly allow the appeal, and, setting aside the decree of the lower appellate Court with costs here and in the Court below, restore that of the Court of first instance. Costs in this Court will include fees on the higher scale.

1905

MUNAWAR  
HUSAIN  
v.  
JANI BIJAI  
SHANKAR.

*Appeal dismissed.*

(1) (1889) 1 L. R., 12 All., 64.



1905  
April 25.

*Before Mr. Justice Banerji and Mr. Justice Richards.*

CHIEDI (DEFENDANT) v. GULAB (PLAINTIFF) \*

*Act No. IX of 1887 (Provincial Small Cause Courts Act), Schedule II, Art. 28*  
—Small Cause Court—Jurisdiction—Suit to recover movable property by right of inheritance.

*Held* that a suit to recover specific movable property claimed by right of inheritance and alleged to be wrongfully retained by the defendant is a suit within the jurisdiction of a Court of Small Causes and is not excluded by article 28 of the second schedule to Act No. IX of 1887. *Kapalee Bewah v. Keshram Kooch* (1) and *Moheshur Mondul v. Koilash Nath Mondul* (2) followed.

THE facts of this case are briefly as follows :—

The son of the plaintiff had married the daughter of the defendant. The defendant's daughter died. Subsequently the plaintiff's son died intestate. The plaintiff then as heir to her son sued the defendant to recover from him certain jewellery which the plaintiff alleged to have been given to the defendant's daughter on her marriage. The suit was brought in a Court of Small Causes, which gave the plaintiff a decree. Thereafter the defendant moved the District Judge to make a reference to the High Court under section 616B of the Code of Civil Procedure upon the ground that the hearing of the suit by a Court of Small Causes was excluded by article 28 of the second schedule to the Provincial Small Cause Courts Act, 1887. The District Judge accordingly submitted the case for orders.

The applicant was not represented.

Munshi *Huribans Sahai*, for the opposite party.

BANERJI and RICHARDS, JJ.—This is a reference by the District Judge of Allahabad under s. 616B of the Code of Civil Procedure. He is of opinion that the suit was not cognizable by a Court of Small Causes and that the Judge of the Small Cause Court at Allahabad in entertaining the suit exercised a jurisdiction not vested in him by law. The claim was for recovery of certain ornaments or their value, upon the allegation that they were given to the plaintiff's daughter-in-law at her marriage; that upon the death of the daughter-in-law, who died at the house of the defendant, her father, he appropriated the ornaments; that the plaintiff's son, Data Din, the husband of

\* Miscellaneous No. 27 of 1905.

the defendant's daughter, succeeded to the property by right of inheritance to his wife, and that upon his death it passed to the plaintiff, his mother, as his legal representative. The value of the suit was Rs. 100. The learned judge is of opinion that "the suit comes under article 28 of the second schedule to the Provincial Small Cause Courts Act" and is one "for the whole or a share of the property of an intestate." We do not agree with the learned judge. The article in our opinion contemplates a suit between rival claimants to the property of an intestate and applies to suits in which the claim is made to the whole or a share of the property of an intestate *as such*. This is not a suit of that description. With reference to a similar provision in section 6 of Act No. XI of 1865 it was held in *Kapalee Bewah v. Keshram Kooch* (1) that a suit by a widow as heiress of her deceased husband for personal property carried away by the defendants was not excluded from the jurisdiction of a Court of Small Causes. A similar view was held in *Moheshur Mondul v. Koilash Nath Mundul* (2). We agree with those rulings, and are of opinion that this suit does not fall within the purview of article 28 and was cognizable by the Court of Small Causes. For the above reasons we decline to interfere, and direct that the record be returned.

1905

CHHEDI  
v.  
GULABO.

## REVISIONAL CRIMINAL.

1905  
April 27.*Before Mr. Justice Aikman.*

IN THE MATTER OF THE PETITION OF CHET RAM AND OTHERS.\*

*Criminal Procedure Code, sections 107, 118 and 406—Security for keeping the peace—Appeal.*

*Held* that no appeal will lie from an order under section 118 of the Code of Criminal Procedure requiring security to be furnished for keeping the peace.

IN this case Jiraj, Bhure, Chet Ram and several other persons were ordered by a Magistrate of the first class to find security for keeping the peace in varying amounts for the space of one year. Against this order Jiraj and Bhure appealed to the Magistrate of the district, who heard ~~the~~ appeal, but

\* Criminal Revision No. 92 of 1905.

(1) (1869) 11 W. R., 93.

(2) (1880) 5



1905

IN THE  
MATTER OF  
THE  
PETITION OF  
CHET RAM.

rejected it. Jiraj and Bhure then applied to the High Court for revision of the orders of the Courts below, but were again unsuccessful. Chet Ram and the others appealed separately to the District Magistrate, who rejected their appeals also. They also then moved the High Court in revision, complaining that no notice had been given to them of the date upon which their appeal to the District Magistrate would be heard, and they were therefore unable to have themselves represented at the hearing. This ground was supported by the affidavit of Jiraj. At the hearing of the application for revision in the High Court the question was raised whether any appeal lay at all to the District Magistrate.

Mr. R. K. Sorabji and Babu Satya Chandra Mukerji, for the applicants.

The Assistant Government Advocate (Mr. W. K. Porter), for the Crown.

AIKMAN, J.—By an order passed under section 118 of the Code of Criminal Procedure the applicants were directed to execute a bond with sureties for keeping the peace. The order was passed by a Magistrate of the first class. Against this order they presented an appeal to the learned District Magistrate, by whom it was dismissed on the 2nd of January last. The applicants apply to this Court to interfere in revision on the ground that no notice was given to them or their pleader of the date fixed for the hearing of the appeal. In support of this application an affidavit is filed by one Jiraj, who had also been ordered by the Magistrate to furnish security for keeping the peace. In my opinion this affidavit is worthless. I find on the learned District Magistrate's record an order passed by him upon an application for rehearing of the appeal, in which order it is stated that the applicant's pleader was informed of the date fixed for the hearing of the appeal. No affidavit by the pleader is filed. Apart from this, there is another reason why I should decline to interfere. It is this. Section 118 of the Code of Criminal Procedure authorizes a Magistrate to make an order in cases in which "it is in his opinion proved to be necessary for keeping the peace or maintaining good behaviour." Now, although the order does give a right of appeal to the District

1905

IN THE  
MATTER OF  
THE  
PETITION OF  
CHET RAM.

Magistrate from an order to give security for good behaviour, nowhere in the Code is any right of appeal given from an order to give security for keeping the peace. Section 404 of the Code provides that no appeal shall lie from any judgment or order of a Criminal Court, except as provided by this Code or by any other law for the time being in force. From the language of his judgment in this and in the connected case which is before me it appears that the learned District Magistrate is under the impression that an appeal does lie to him from orders for giving security to keep the peace. But this is a mistake. The applicants had no right of appeal, and no right to be heard at all. For the above reasons I dismiss this application.

## APPELLATE CIVIL.

1905  
April 28.

*Before Mr. Justice Banerji and Mr. Justice Richards.*

BALDEO PRASAD AND ANOTHER (PLAINTIFFS) v. IBN HAIDAR  
AND OTHERS (DEFENDANTS).\*

*Act No. IV of 1882 (Transfer of Property Act), sections 88 and 89—Civil Procedure Code, section 235—Execution of decree—Limitation—Act No. XV of 1877 (Indian Limitation Act), schedule II, articles 178 and 179.*

*Held* that an application, framed as an application under section 235 of the Code of Civil Procedure, for execution of a decree under section 88 of the Transfer of Property Act, being in substance, though not in form, an application for an order absolute under section 89 of the Act, is an application for execution made in accordance with law, and as such will give a fresh starting point for limitation. *Oudh Behari Lal v. Nagashar Lal* (1), *Chunni Lal v. Harnam Das* (2), *Ahmad Ali v. Naziran* (3) and *Udit Narain v. Jagannath* (4) referred to.

THE facts out of which this appeal arose are as follows:—

A decree under section 88 of the Act was passed in favour of two persons, Baldeo Prasad and Ram Ghulam, on the 13th of April 1895, and the date fixed in it for payment of the mortgage money was the 13th of October 1895.

\*First Appeal No. 235 of 1902 from a decree of Mr. Muhammad Tajammul Husain, Subordinate Judge of Fatchgarh, dated the 7th July 1902.

(1) (1890) I. L. R., 13 All., 278.

(2) (1898) I. L. R., 20 All., 302.

(3) (1902) I. L. R.

(4) (1904) I. L. R.

1905

BALDEO  
PRASAD  
v.  
IBN HAIDAR.

On the 11th of April 1898 Baldeo Prasad, one of the decree-holders, on his own behalf and on behalf of the other decree-holder, made an application for the sale of the mortgaged property. It was not in terms an application for an order absolute for sale under section 89 of the Transfer of Property Act, 1882, but it was in the usual form of an application for execution under section 235 of the Code of Civil Procedure. It was, however, treated by the executing Court as equivalent to an application for an order absolute under section 89, for that Court made an order directing that "notice under section 89 be issued to the judgment-debtors." A notice was accordingly issued, but it was returned unserved, and, as the decree-holder's pleader failed to furnish the proper address of the judgment-debtors, the case was struck off the file on 4th of June 1898.

On the 13th of February 1901 another application in almost the same terms as the previous application was filed. The Court caused some formal defect in it to be amended, and then the officer of the Court reported that an order absolute under section 89 had been prepared upon the previous application of the 11th of April 1898. This report was in fact incorrect, as no order under section 89 had been actually made or prepared. The Court, however, assumed that such an order had been passed, but on the 27th of February 1901 rejected the application, under the provisions of section 245 of the Code of Civil Procedure, on the ground that it had not been accompanied by an extract from the Collector's register as required by section 238 of the Code.

The next application was made on the 29th of May 1901. It was dismissed on the 17th of June 1901, the Court recording the following order:—"It appears that an application was made for an order absolute, but that application was struck off for default. So long as a decree absolute is not prepared the property cannot be sold. Application dismissed."

Upon the passing of this order the present application was made on the 19th of May 1902 for an order absolute under section 89 of the Transfer of Property Act.

The Court to which this application was made (Subordinate Judge, Allahabad) came to the conclusion that execution

of the decree was time-barred, and accordingly dismissed the application. The decree-holders thereupon appealed to the High Court.

Munshi *Gulzari Lal*, for the appellants.

Maulvi *Muhammad Ishaq*, for the respondents.

BANERJI, J.—This appeal arises out of an application made under section 89 of the Transfer of Property Act, 1882, for an order absolute for sale, which has been dismissed by the Court below on the ground of limitation. The only question which we have to determine in this appeal is whether the application is time-barred.

The decree under section 88 of the Act was passed in favour of two persons, Baldeo Prasad and Ram Ghulam, on the 13th of April 1895, and the date fixed in it for payment of the mortgage money was the 13th of October 1895. The present application was made on the 19th of May 1902. Whether this application is governed as to limitation by article 178 or by article 179 of the second schedule to the Limitation Act, it would be time-barred, unless the operation of limitation was saved by certain applications which were made in the interval, and to which I shall presently refer.

On the 11th of April 1898 Baldeo Prasad, one of the decree-holders, on his own behalf and on behalf of the other decree-holder, made an application for the sale of the mortgaged property. It was not in terms an application for an order absolute for sale under section 89, but it was in the usual form of an application for execution under section 235 of the Code of Civil Procedure. It was held by a full Bench of this Court in *Oudh Behari Lal v. Nageshar Lal* (1) that an application for an order absolute under section 89 of the Transfer of Property Act is an application in execution subject to the rules of procedure governing such matters, and that an application for execution of the decree under section 88 of the Act is a good application under section 89 and a separate application is not requisite. Upon the authority of this ruling the applicant in this case on the 11th of April 1898 may be deemed to have applied for execution under section 89. The record shows that the application was made by

1905

BALDEO  
PRASADv.  
IBN HAIDAR.

1905

BALDEO  
PRASADv.  
JBN HAIDAR.

the Court as such, as the Court made an order directing that "notice under section 89 be issued to the judgment-debtor." A notice was accordingly issued, but it was returned unserved, and, as the decree-holder's pleader failed to furnish the proper address of the judgment-debtors, the case was struck off the file on 4th June 1898.

On the 13th of February 1901 another application in almost the same terms as the previous application was filed. The Court caused some formal defect in it to be amended, and then the officer of the Court reported that an order absolute under section 89 had been prepared upon the previous application of the 11th of April 1898. This report was in fact incorrect, as no order under section 89 had been actually made or prepared. The Court, however, assumed that such an order had been passed, but on the 27th of February 1901 rejected the application, under the provisions of section 245 of the Code of Civil Procedure, on the ground that it had not been accompanied by an extract from the Collector's register as required by section 238 of the Code.

The next application was made on the 29th of May 1901. It was dismissed on the 17th of June 1901, the Court recording the following order:—"It appears that an application was made for an order absolute, but that application was struck off for default. So long as a decree absolute is not prepared the property cannot be sold. Application dismissed."

Upon the passing of this order the present application was made on the 19th of May 1902 for an order absolute under section 89 of the Transfer of Property Act. As I have already pointed out, this application must, according to the ruling of the Full Bench in *Oudh Behari Lal v. Nageswar Lal* (1) which was followed in *Chunni Lal v. Harnam Das* (2) and other cases, be held to be an application for execution, and will therefore be governed as regards limitation either by article 178 or by article 179 of the second schedule to the Limitation Act. The latter article will apply if any of the clauses specified in the third column of article 179 can be made applicable, otherwise article 178 will apply. This was held, in the analogous case of an

(1)

I.L.R., 278.

(2) (1898) I.L.R., 20 All., 302.

application under section 87 for an order absolute for foreclosure, in *Ali Ahmad v. Naziran* (1), and in the case of an application under section 89 in *Udit Narain v. Jagannath* (2). As none of the clauses in article 179 can apply to a first application under section 89, such an application will be governed by article 178. But subsequent applications will be governed by article 179. In this case it is contended on behalf of the appellants that the fourth paragraph of article 179 applies and that the previous applications to which I have referred were "applications in accordance with law to the proper Court for execution." In my judgment there is much force in this contention. Having regard to the ruling of the Full Bench in *Oudh Behari Lal v. Nageshar Lal* (3) the previous applications were applications for execution, and although they did not in specific terms ask for an order absolute under section 89, they were none the less applications for such an order. As already stated, the Court treated the first application as an application under section 89 and ordered notice to issue under that section. When the next application was made the Court assumed that an order under section 89 had already been made. As in both these applications the prayer was that the property be sold, both of them may legitimately be treated as applications for an order for sale, although they were also applications for the actual sale of the property. The first two applications, dated respectively the 11th of April 1898 and the 13th of February 1901, were thus applications for execution made to the proper Court in accordance with law, and the decision of the Court below to the contrary is in my opinion erroneous. The first application was made within three years of the date on which the appellant's right to apply accrued and was therefore within time under article 178. The second application having been made within three years of the first was also within time under article 179, paragraph 4. The present application was made within three years of the second application. Therefore, even if we do not take into account the third application, the present application was not time-barred. In my judgment the Court below was in error in holding that it was so,

1905

BALDHO  
PRASADv.  
IBN HATDAR.

(1) (1902) I. L. R., 24 All., 542.

(2) (1904) 1 All.

15.

(3) (1890) I. L. R., 13 All., 279

1905

BALDEO  
PRASADv.  
IBN HAIDAR.

and this appeal must prevail. As Musammat Mamman Bibi, one of the respondents, was not served with notice of the appeal, and no steps were taken to serve her, the appeal against her must fail, and the application of the appellants must be dismissed as against her and her interest in the mortgaged property. As there was no other objection to the application save that of limitation, and that objection is in my opinion untenable, the application for an order absolute should be granted against all the respondents except Musammat Mamman Bibi. I would allow the appeal, and, setting aside the order of the Court below with costs in both Courts, grant the application of the appellants against all the respondents save Musammat Mamman Bibi and her interest in the mortgaged property. As against her and her interests the application should stand dismissed.

RICHARDS, J.—I concur.

*Appeal decreed.*

1905

May 9.

## REVISIONAL CRIMINAL.

*Before Mr. Justice Knox and Mr. Justice Aikman.*

ABDUR RAZZAQ (APPLICANT) v. RAHMAT-ULLAH (OPPOSITE PARTY).<sup>a</sup>  
*Criminal Procedure Code, sections 517, 520—Order for the disposal of property regarding which an offence has been committed—Half currency notes.*

When a question arises between two persons who shall bear a loss resulting from the fraud of a third, the one who has been guilty of negligence shall suffer. Hence where A made over to B halves of certain currency notes as security for payment to B of the price of goods delivered, having previously parted with the other halves to C, it was *held* that B was entitled to recover possession of the halves originally made over to him, from C, to whom they had been delivered under an order of the Court, or to obtain compensation from C, if C had parted with them, inasmuch as it was C's negligence which enabled A to perpetrate a fraud upon B. *Foster v. Green* (1) followed.

ABDUR RAZZAQ, the petitioner in this case, was a dealer in hides carrying on business in Cawnpore. On the 2nd of December 1903 he received from one Abdul Haq, also a dealer in hides, <sup>1</sup> halves of two currency notes for one hundred rupees. Following day Abdul Haq gave Abdur Razzaq



1905

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 ABDUL  
 RAZZAQ  
 v.  
 RAHMAT-  
 ULLAH.

the right half of another currency note for Rs. 100, and promised to hand over the remaining halves in a day or two. On the faith of this promise Abdur Razzaq allowed Abdul Haq to take away skins worth Rs. 644. Abdul Haq did not hand over the remaining half notes. On being asked for them he told Abdur Razzaq that he had lost them and was in communication with the Calcutta Currency Office about the loss. After a long delay Abdur Razzaq discovered that this story was false, and that the other half notes had in fact been given by Abdul Haq to another dealer in hides named Rahmat-ullah. Abdur Razzaq then prosecuted Abdul Haq in the Criminal Court, with the result that Abdul Haq was convicted on the 24th of November 1904 of the offence of cheating and sentenced to imprisonment and fine under section 420 of the Indian Penal Code. When giving evidence at the trial, Abdur Razzaq produced the half notes which he had received from the accused. Rahmat-ullah was also a witness against the accused, and proved that he had received from the accused on the 2nd of December 1903 the other halves of the same notes. Apparently Rahmat-ullah received the left halves before the right halves were given to Abdur Razzaq. After the conviction of Abdul Haq the convicting Magistrate ordered that the half notes produced by Abdur Razzaq should be returned to him. Thereupon Rahmat-ullah petitioned the Court of Session to revise the Magistrate's order above referred to. The Sessions Judge acceded to this application, and directed that the half notes which had been produced by Abdur Razzaq should be made over to Rahmat-ullah. The present application was accordingly presented to the High Court asking that the Sessions Judge's order should be set aside and the half notes restored to the applicant.

Mr. C. Ross Alston, for the applicant.

Mr. A. H. C. Hamilton, for the opposite party.

AIKMAN, J.—This is an application for revision of an order of the learned Sessions Judge of Cawnpore passed under the provisions of section 520 of the Code of Criminal Procedure.

The following are the facts of the case:—

Abdur Razzaq and Abdul Haq were dealers in hides and skins carrying on business in Cawnpore.

1905

ABDUR  
RAZZAQ  
v.  
RAHMAT-  
ULLAH.

December 1903 Abdul Haq gave to Abdur Razzaq the right halves of two currency notes for Rs. 100. On the following day Abdul Haq gave Abdur Razzaq the right-half of another currency note for Rs. 100. He promised him the remaining halves of the notes in a day or two. On the faith of this promise Abdur Razzaq allowed Abdul Haq to take away skins worth Rs. 644. Abdul Haq did not give Abdur Razzaq the remaining halves. On being asked for them he told Razzaq that he had lost them and was in communication with the Calcutta Currency Office about the loss. After a long delay, Abdur Razzaq discovered that Abdul Haq's story of having lost the half notes and applied to the Currency Office was false, the half notes having been given by Abdul Haq to another dealer in hides named Rahmat-ullah. Abdur Razzaq then prosecuted Abdul Haq in the Criminal Court, with the result that Abdul Haq was convicted on the 24th November 1904 of cheating and sentenced to imprisonment and fine under section 420, Indian Penal Code. When giving evidence at the trial, Abdur Razzaq produced the half notes which he had received from the accused. Rahmat-ullah was also a witness against the accused, and proved that he had received from the accused on the 2nd December 1903 the corresponding halves of the currency notes. It is found that Rahmat-ullah received the left halves before the right halves were made over to Abdur Razzaq. At the conclusion of the trial the learned Magistrate acting under the provisions of section 517, Code of Criminal Procedure, ordered that the half notes produced by Abdur Razzaq should be returned to him.

Rahmat-ullah then petitioned the Court of Session to revise the Magistrate's order directing the return of the half notes to Abdur Razzaq. Acting under the powers conferred by section 520 of the Code of Criminal Procedure the learned Judge annulled the Magistrate's order and directed the half notes which had been produced by Abdur Razzaq should be made over to Rahmat-ullah. Abdur Razzaq now moves this Court to review the order of the learned Judge.

*Tad v. Puran* (1) is authority, if authority that this Court can interfere in revision

with an order made under section 520, Code of Criminal Procedure. That section provides that a Court, after annulling an order under section 517, may "make any further orders that may be just."

The question we have to decide is whether the order of the learned Sessions Judge directing the half notes produced by Abdur Razzaq to be made over to Rahmat-ullah is under the circumstances a just order.

In my opinion it is not.

In the first place, I see no reason whatever for doubting that Abdur Razzaq received the half notes in good faith and gave value for them. It is true that Rahmat-ullah endeavoured to make out that the right halves of currency notes are not received before the left halves, but the learned Magistrate finds that no such custom exists.

Now, had Abdur Razzaq received whole currency notes in good faith, there is no doubt that he would have been entitled to retain them, even if it had been proved that the currency notes had been stolen. In the present case the half notes which Abdur Razzaq received had not been stolen or criminally misappropriated by Abdul Haq. I have not been able to find any case in which the rule regarding whole currency notes has been applied to half notes. But it is clear that it was the conduct of Rahmat-ullah in allowing Abdul Haq to retain possession of the half notes which enabled the latter to perpetrate the fraud on Abdur Razzaq. "When a question arises between two persons who shall bear a loss resulting from the fraud of a third, the one who has been guilty of negligence shall suffer"—*Foster v. Green*, (1). Applying this principle to the facts of the present case, I am of opinion that it is not just to direct that the half notes produced by Abdur Razzaq should be made over to Rahmat-ullah. I would therefore set aside the order of the learned Judge, and direct that Rahmat-ullah restore the half notes to Abdur Razzaq. To provide for the contingency of Rahmat-ullah having parted with the notes, and thus put it out of his power to comply with this order, I would alternatively direct that Rahmat-ullah pay Abdur Razzaq Rs. 75.

1905

ABDUR  
RAZZAQv.  
RAHMAT-  
ULLAH.

1905

ABDUR  
RAZZAQv.  
RAHMAT-  
ULLAH.

This under the circumstances appears to me to be the order which is just.

KNOX, J.—I concur.

BY THE COURT.—The order of the Court below is set aside, and an order will issue directing that Rahmat-ullah restore the half notes to Abdur Razzaq, or if the half notes cannot be returned, pay Abdur Razzaq the sum of Rs. 75.

P. C.  
1905February  
23, 24.  
May 18.

## PRIVY COUNCIL.

SHEO SINGH (DEFENDANT) v. RAGHUBANS KUNWAR (PLAINTIFF.)

[On appeal from the Court of the Judicial Commissioner of Oudh.]

*Act No. I of 1869 (Oudh Estates Act), section 2—Succession under will taking effect before Act came into force—“ Legatee ” of a taluqdar—Surrender of grant by taluqdar and acceptance of sanad on new terms—Power of taluqdar—Power of Government to change nature of sanad—Act No. XV of 1895 (Crown Grants’ Act), section 3—Privy Council, discretion of, to allow new case to be set up on appeal.*

A person who succeeded to a taluq in 1865, and therefore before the passing of the Oudh Estates Act (I of 1869) under a will of the preceding taluqdar, is not the legatee of a taluqdar within the meaning of the Act. *Balraj Kunwar v. Rao Jagatpal Singh* (1) followed.

An estate in Oudh was settled with a taluqdar in 1859 and a sanad was granted to him under which the estate descended to the grantee and his heirs without indication of the line of inheritance. To the heir who succeeded him as taluqdar was granted in 1861, in substitution of the former one, a sanad under which the taluq descended to him and his nearest male heir by the rule of primogeniture. The Lower Courts held that the second sanad could not, even if proved, operate to substitute the line of descent prescribed by it for the line prescribed by the former sanad, and they decided the case on other grounds. *Held* by the Judicial Committee, who found that the second sanad and its terms were proved, that the taluqdar succeeding as heir had power to surrender the estate conveyed by the old sanad. When he succeeded as heir he became absolutely entitled by inheritance to everything that passed under the earlier grant, and there was nothing to prevent his entering into an arrangement with the Government to surrender it in consideration of a re-grant of the same estate on new terms. To such a transaction the fact that the Government having already granted the estate in the former taluqdar and his heirs had nothing left to grant

LORD ROBERTSON, and SIR ARTHUR WILSON.

A., 132; 1. L. R., 26 All., 393.

1905

SHEO SINGH  
v.  
RAGHUBANS  
KUNWAR.

to the succeeding taluqdar would not apply; and the Government therefore on its surrender had power to grant the same estate under the new sanad.

Section 3 of the Crown Grants' Act (XV of 1895) which made valid "all provisions, restrictions, conditions, and limitations over, contained in any grant or transfer" made by the Government or under their authority, "any rule of law, statute or enactment of the Legislature to the contrary notwithstanding" was held by the Judicial Committee to remove the force of an objection that no executive act of the Government could, in or after 1861 have created an estate descendible by any rule of inheritance other than that laid down by law, which in this case was the Hindu law.

The above case was allowed to be set up on appeal to the Privy Council though it had not been made in the written statement, nor raised by any specific issue, where the issues as settled were sufficiently wide to cover it, and all parties had been aware of the importance of the primogeniture sanad if it could be shown to have been granted and its contents could be ascertained, and were therefore not taken by surprise by the way in which the case was presented on appeal, so that no injustice could be done by disposing of the appeal upon it.

**APPEAL** from a judgment and decree (26th March 1903) of the Court of the Judicial Commissioner of Oudh, which affirmed a decree (6th August 1902) of the Subordinate Judge of Sitapur in favour of the respondent.

The suit out of which the appeal arose was brought by the respondent under the following circumstances.

The taluqa of Mahewa, the property in dispute, was before the annexation of Oudh owned by one Gajraj Singh, and after the confiscation of Oudh the Second Summary Settlement was made with him, and his name was entered in lists 1 and 2 of the lists required to be prepared under section 8 of the Oudh Estates Act (I of 1869). In accordance with a Government Circular dated 11th October 1859 enquiries were made of him (as of other taluqdars) in regard to the succession to his estate, and his replies indicated that it would descend to his male heirs successively. A sanad was therefore granted to him of the estate such as is mentioned in Lord Canning's letter dated 19th October 1859.

Gajraj Singh died on 16th January 1860 leaving him surviving two brothers, Girwar Singh and Dunia Singh, of whom Girwar Singh was the elder, two nephews, namely, Sheo Singh (the appellant) and Dar Singh, and a widow Anand Kunwar. On the death of

1905

SHEO SINGH  
v.  
RAGHUBANS  
KUNWAR.

Singh succeeded to the taluqa and was recognized by the Government as taluqdar. He was also asked as to the succession to the estate and in reply he stated the family custom to the same effect as Gajraj Singh had done. In 1861 the Government proposed, in the case of any taluqdar whose oldest son by custom succeeded him, to change the ordinary form of sanad for a sanad stating that primogeniture would be the line of inheritance. Girwar Singh on being asked if he wished this change to be made replied that he wished for a primogeniture sanad, and one was said to have been granted to him. On 4th March 1862 Girwar Singh made a will devising the estate to Balbhaddar Singh, whom (as the respondent alleged, though this was denied by the appellant) he also formally adopted in 1864.

On 2nd January 1865 Girwar Singh died and was succeeded by Balbhaddar Singh, who himself died on 12th December 1898 without issue, but leaving his widow Raghubans Kunwar (the respondent) and his brother Sheo Singh, both of whom claimed to be the next heir to the estate. On 11th February 1899 mutation of names was ordered by the revenue authorities to be made in favour of Sheo Singh, and he was put in possession of the estate.

On 6th February 1900 Raghubans Kunwar instituted the present suit for possession of the estate with mesne profits. The plaint alleged (paragraphs 8 and 9) that of the property in suit a portion formed the original estate of Gajraj Singh, and the remainder had been subsequently acquired by Girwar Singh with the exception of one village, Munda Nizam, which was the separate property of Anand Kunwar, the widow of Girwar Singh, and on her death on 25th December 1897, Balbhaddar Singh succeeded thereto. The plaintiff pleaded that the succession to the whole estate was governed, not by the provisions of Act I of 1869, but by the Hindu Law, under which she was the nearest heir as widow of Balbhaddar Singh: but that even if the succession was regulated by section 22 of Act I of 1869 she was entitled to succeed under clause (7) of that section as Balbhaddar Singh had been lawfully adopted by her late husband, and the defendant was therefore

not Balbhaddar Singh's brother within the meaning of clause (6) of that section.

The defence was that the estate descended in accordance with the provisions of section 22 of Act I of 1869, and not according to Hindu law; that Balbhaddar Singh was not adopted by Girwar Singh; that even if he had been adopted the defendant was his brother within the meaning of clause (6) of section 22 of the Act and was therefore entitled to succeed under that clause; and that even if the estate descended according to Hindu law, the plaintiff was not entitled to succeed, as there was a custom in the family by which females were excluded from inheritance. The issues now material were—

1. Did Girwar Singh adopt Balbhaddar Singh about thirty-five or thirty-six years ago?
2. (a) Whether Anand Kunwar left, among other property, a village named Munda Nizam, to the ownership and possession of which (along with other property) Balbhaddar Singh alone succeeded as heir?  
(b) Whether it was in her possession as *guzara*, and on her death came into Balbhaddar Singh's possession, and was merged in the taluqa?
3. Whether Balbhaddar Singh died leaving plaintiff as his heir, and also the properties detailed in lists 1, 2, 3 and 4 annexed to the plaint and written replication?  
If so, whether plaintiff succeeded to the ownership and possession thereof?
4. Whether the plaintiff is entitled to succeed to the property, both taluqdari and non-taluqdari, left by her husband, under the ordinary law, as well as under section 22, Act I of 1869?
5. Whether succession to all property, taluqdari or non-taluqdari, left by Balbhaddar Singh, devolves on defendant according to the rule laid down in section 22, Act I of 1869?

1905

SHRO SINGH  
v.  
RAGHUBANS  
KUNWAR.



1905

SHEO SINGH  
v.  
RAGHUBANS  
KUNWAR.

6. Is there a family custom in the Mahewa *gaddi* by which a woman is altogether excluded from succession, and is the plaintiff therefore not entitled to succeed to her deceased husband's property?

Before the Subordinate Judge it was also contended for the defendant that a primogeniture sanad was granted to Girwar Singh; but no such sanad was produced and the Subordinate Judge held that the secondary evidence in support of it was not sufficient. On the above issues the Subordinate Judge found that Girwar Singh had validly adopted Balbhaddar Singh and that the village of Munda Nizam was the separate property of Anand Kunwar. He was of opinion that Act I of 1869 had no application to the case, that the succession was governed by the ordinary Hindu law, under which the plaintiff was the next heir, and that the custom excluding females from succession was not proved. He also held that on the true construction of section 22, clause (6) of Act I of 1869, Balbhaddar Singh had, in consequence of his adoption, ceased to be the brother of Sheo Singh, and that the plaintiff was a nearer heir even under the provisions of that section. The Subordinate Judge summed up his findings on the issues in the following passage of his judgment:—

"To sum up, it has been found that Balbhaddar Singh was the legally adopted son of Girwar Singh; that he succeeded to the property left by Girwar Singh, as his heir and legatee; that Balbhaddar Singh died leaving plaintiff, his heir, and the properties set out in the plaint, that the succession to the said properties is not governed by the rules set out in section 22 of Act I of 1869 but by the Hindu law, that the plaintiff is entitled to succeed as his heir, and that even if the Act had been applicable to the succession, the plaintiff should have succeeded under the provisions of the Act, and that there is no valid custom by which women are excluded from inheriting to the Mahewa estate. As a result of these findings the plaintiff is entitled to possession of the properties set out in the plaint and to mesne profits, the amount of which will be determined in the execution department."

On the question of the primogeniture sanad the Subordinate Judge said:

"It has been contended on behalf of the defendant that a primogeniture sanad was granted to Girwar Singh, and therefore he acquired a permanent, heritable and transmissible right in the estate. This sanad has not been produced. The defendant alleged that it was in the possession of the

1905

SHEO SING

v.

RAGHUBANS  
KUNWAR.

plaintiff, who, though repeatedly summoned to produce it, did not do so; that, therefore, the presumption is that if it had been produced, it would have been unfavourable to her. The only evidence of the allegation that such a sanad was granted is (1) Girwar Singh's reply to a reference made to him by the Deputy Commissioner of Kheri, on receipt of the Chief Commissioner's Circular No. 154, dated the 26th September 1860, calling upon every taluqdar in whose family the rule of primogeniture had not prevailed to declare whether he was desirous that that rule should be applicable to his estate. Girwar Singh's reply was to the effect that he desired to take the sanad in the new form. (2) The recital of the bond which Balbhaddar Singh and Anand Kunwar executed in 1881, in favour of the Bank of Upper India, Limited, to the effect that Girwar Singh was the owner of the estate by virtue of a sanad granted to him by the British Government under the hand and seal of G. U. Yule, Esq., Officiating Chief Commissioner of Oudh. (3) The mention of the fact that Girwar Singh obtained the sanad of the estate in the order sheet of the case which Government brought against Balbhaddar Singh (A., 166) for declaration of superior proprietary right to mauza Parsehra. Before dealing with these documents it is necessary for me to consider whether the circumstances of the case are such as to justify the inference that the sanad was in the possession of the plaintiff and she refused to produce it, and therefore it should be presumed that if produced it would have been unfavourable to the plaintiff.

"If a sanad was granted in accordance with the wish expressed by Girwar Singh, the defendant could have proved its contents under section 91, Indian Evidence Act. The defendant wants the Court to presume everything against the plaintiff who is said to have kept him out of possession of the sanad, an important piece of evidence in the case, and to be retaining that evidence in her own custody. Such a presumption would arise if the defendant had exhausted the means that were at his disposal to prove it by producing secondary evidence of its contents. Secondary evidence of course includes a certified copy or a copy made from or compared with the original. Defendant had a right to produce all secondary evidence mentioned in section 63, Evidence Act, and he could have done so had he liked, but he did not do so, and in order to supply this omission he desired the Court to accept the form printed at page 386 of Mr. Sykes' book as secondary evidence. This cannot be done for this reason, that if a sanad were granted it could not have been issued in the form above referred to to Girwar Singh. The form says:— 'I, G. U. Yule, Officiating Chief Commissioner of Oudh, under the authority of His Excellency the Governor-General of India in Council do hereby confer on you the full proprietary right . . . . of the estate consisting of the villages as per list attached to the *kabuliat* you have executed. Did Girwar Singh execute a *kabuliat*? If so, it must be in the Deputy Commissioner's office, Kheri, or at any rate among some Government records. The defendant should have procured its production in order to show what is contained in it. No presumption as to its contents would arise. The defendant admitted in his written statement that before the summary settlements were made with Gajraj Singh, that he executed the *kabuliat* in respect

1905

SHEO SINGH  
v.  
RAGHUBANS  
KUNWAR.

of the estate of Mahewa consisting of the villages named therein, a copy of which the defendant has produced (A., 153). A taluqdafi sanad was granted to him in accordance with the directions contained in Government letter No. 6268, dated the 10th October 1859: that sanad must have been issued in the form given in Mr. Sykes' book. If a fresh sanad was issued to Girwar Singh surely he must have executed a fresh *kabuliat*. If such had been the case, the defendant could have easily obtained a copy of it from the Deputy Commissioner's office and produced it in Court in proof of the case. Then again, Gajraj Singh's name was entered in list No. 2, which is a list of taluqdars whose estates devolved upon a single heir and not a list of taluqdars to whom primogeniture sanads had been granted. Had a primogeniture sanad been granted to Girwar Singh, the entry in list No. 2 would have been thereby superseded and his name would have been entered in list No. 3. Such, however, is not the case.

"It has been contended on behalf of the defendant that under the Oudh Estates Act, every taluqdar shall be deemed to have a permanent heritable and transferable right in the villages attached to his *kabuliat* . . . subject to all the conditions affecting the taluqdar; that the conditions referred to are conditions regarding succession. The contention is not sound, because it has been held that the conditions referred to are such as the destruction of forts, loyalty and good service. These conditions are mentioned in the sanad. The sanad granted to Gajraj Singh lays down that the estate has been conferred upon him and his *heirs* for ever. It does not limit the word heirs to male heirs.

"A sanad was granted to Gajraj Singh, and he could have consented to have it changed, and if he had done so it would have been binding on his heirs and successors, but if Girwar Singh got it converted into a primogeniture sanad he could not, by doing so, himself derive any benefit or confer any benefit on his heirs and successors.

"The condition in the penultimate paragraph of the primogeniture sanad refers to cases of intestate succession. It would not apply to a case where a sanad-holder has transferred or bequeathed his estate to some person, because a transferee or legatee of a taluqdar would not have the same rights as the taluqdar has, after his demise. Thus it is quite clear that Girwar Singh did not come within the purview of section 3 of the Act, that the grant of a sanad, assuming that a sanad was granted to him, would not make him a taluqdar within the meaning of the Act, and that the provisions thereof would apply to those villages only which would be covered by it, namely, those named in the list attached to the agreement or *kabuliat* which Girwar Singh might have executed, and that there is nothing to show that any such agreement or *kabuliat* was ever executed by him.

"I will now proceed to consider the two documents relied upon by the defendant as secondary evidence of the contents of the sanad. The first is a bond which Balbir Singh and Thakurain Anand Kunwar had executed in favour of the Bank of Upper India, Limited, on 28th April, 1881. It recites that Raja Girwar Singh was the absolute owner of the estate by virtue of a sanad granted to him by the British Government, under the hand and

seal of the office of George Udney Yule, Esq., the Officiating Chief Commissioner of Oudh.

"The second document is copy of order sheet of the suit which Government brought against Balbhaddar Singh for declaration of superior proprietary right to mianza Parschra, in which the fact that Girwar Singh obtained a taluqdari sanad is mentioned.

"These two documents certainly indicate the existence of a sanad granted to Girwar Singh, but they do not furnish secondary evidence of its contents. Presumably the sanad was granted to Girwar Singh in accordance with the wish expressed by him, and it was a primogeniture sanad, but, as I have stated above, the mere fact of a sanad having been granted to Girwar Singh does not confer upon him the rights and liabilities mentioned in section 3 of the Act. Had his name been entered in the first of the lists mentioned in section 8, and he had executed a *kabuliat*, or obtained a decree from the Court of an officer engaged in making the first regular settlement of the Province of Oudh, in respect of the villages comprised in the taluqa, then he could have had heritable and transferable rights in his estate subject to certain conditions under section 3 of the Act. Such, however, was not the case. Thus it is clear that Girwar Singh was neither a taluqdar, nor a grantee, nor the heir or legatee of taluqdar within the meaning of the Oudh Estates Act, and that therefore the estate did not, on the death of Gajraj Singh, descend upon him under the provisions of section 22 of the Act. In fact that section could not, by any rules of interpretation, be held to have applied to a succession which took place so far back as 1860, about eight or nine years before the passing of the Act. Girwar Singh not having himself succeeded as 'heir' or 'legatee' of Gajraj Singh, Balbhaddar Singh could not have succeeded Girwar Singh as his 'heir' or 'legatee' under the provisions of the Act."

From this decision the defendant Sheo Singh appealed to the Court of the Judicial Commissioner of Oudh. His appeal was heard by the Judicial Commissioner (Mr. ROSS SCOTT) and the first Additional Judicial Commissioner (Mr. G. T. SPANKIE) who on the questions of the adoption of Balbhaddar Singh alleged by the plaintiff, and the custom excluding females from inheriting set up by the defendant, concurred with the findings of the Subordinate Judge.

Differing from the Subordinate Judge the appellate Court decided that the succession to the property in dispute was regulated not by Hindu law but by the provisions of section 22 of Act I of 1869. The first Additional Judicial Commissioner, however, held that if the succession was governed by that section the defendant as the natural brother of Balbhaddar Singh was entitled to succeed under clause (c) of the section,

1905

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SHEO SINGH  
v.  
RAGHUBANS  
KUNWAR.

1905

SHEO SINGH  
v.  
RAGHUBANS  
KUNWAR.

even if the adoption of Balbhaddar Singh took place, and that the son referred to in clause (1) meant a natural son only. The Judicial Commissioner differed from this view and concurred with the Subordinate Judge in holding that the defendant was not the 'brother' of Balbhaddar Singh and was therefore not entitled to succeed under clause (6) of section 22 of Act I of 1869, but that the plaintiff was entitled, as Balbhaddar Singh's widow, to the property in suit.

Before the Judicial Commissioner's Court the defendant produced what purported to be a certified copy of the primogeniture sanad granted to Girwar Singh. As to this and its effect the Court said :

"The defendant alleged, in the course of the suit, that the Government had granted Girwar Singh a primogeniture sanad, and he called on the plaintiff to produce it. The plaintiff did not do so, and the defendant, therefore, alleged that she was keeping it back, and that he should be allowed to give secondary evidence that such a sanad had been granted to Girwar Singh. At the hearing of the appeal, he presented an application to us, asking us to receive in evidence certain documents showing that such a sanad was given to Girwar Singh. After judgment was reserved by us, he produced a certified copy of a sanad, purporting to be a primogeniture sanad, granted by the Chief Commissioner of Oudh to Girwar Singh. It was not seriously contended that no such sanad was granted to Girwar Singh, and I think that the certified copy of it produced should be received in evidence. At the same time it is only right to say, that it is not proved that the original was ever in the possession of the plaintiff, and that she kept it back. The sanad is the form of the primogeniture sanad to be found at page 386 of Sykes' Compendium of Oudh Taluqdari Law. It purports to confer on Girwar Singh and his heirs for ever 'the full proprietary right, title, and possession of the estate of Mahewa.' The following is one of the conditions:—'It is another condition of this grant that in the event of your dying intestate or any of your successors dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture . . . ' The defendant contends that even supposing that the descent of the estate is not regulated by the provisions of section 22 of Act I of 1869, it would be regulated by the above-mentioned condition, and consequently the estate cannot devolve on the plaintiff. The answer to this argument is, that the Government had admittedly granted the Mahewa estate to Gajraj Singh and his heirs for ever by a sanad in the form to be found at page 385 of Mr. Sykes' work mentioned above, and having done so, there was nothing left for it to grant to Girwar Singh. The Government clearly recognized this to be so, for it was the name of Gajraj Singh, and not that of Girwar Singh, which was entered in the list 1, prepared under section 8 of Act I of 1869, and the estate was entered in the list 2 and not in list 3, prepared under the same section, that

is, it was entered as an estate which, according to the custom of the family, devolved upon a single heir, and not as an estate conferred by a sanad declaring that the succession thereto should be regulated by the rule of primogeniture. The question does not depend, however, upon the recognition by the Government of the fact that it had given the estate to Gajraj Singh. The fact which renders the sanad on which the defendant relies absolutely useless, is the fact that the estate had already been conferred by the Government on Gajraj Singh and his heirs for ever, when it professed to give it to Girwar Singh and his heirs for ever. Such recognition only indicates that the Government saw that it had made a mistake."

There being a difference of opinion between the Judges the Court made the following order:

"As we differ in opinion on a point of law, and as the Court consists of three Judges, we might under section 575, Civil Procedure Code, refer the appeal to the third Judge, but as it is likely that even if the appeal were decided according to the opinion of the majority of the Judges of the Court, neither of the parties would accept such opinion, and the unsuccessful party would take the case to the Privy Council, we do not propose to refer the appeal to the third Judge. Accordingly, as there is not a majority of the Judges who heard the appeal, which concurs in the judgment varying or reversing the decree appealed against, the decree must, under section 575, be affirmed. We, therefore, dismiss the appeal with costs and the objections under section 561 with costs, and affirm the decree of the Subordinate Judge."

On this appeal

Mr. *DeGruyther* for the appellant contended that the case was not governed by the Hindu law but by section 22 of Act I of 1869, under which on the death intestate of a taluqdar in lists 1 and 2 of those prepared under the Act his estate descended to the nearest male heir in the line of primogeniture. Reference was made to *Achal Ram v. Udai Pertab Addiya Dat Singh* (1); *Ran Bijai Bahadur Singh v. Jagatpal Singh* (2); *Bhai Narindur Bahadur Singh v. Achal Ram* (3), and *Jagatpal Singh v. Jageshar Bakhsh Singh* (4). If section 22 were applicable, the appellant, it was submitted, was entitled to succeed under clause (6) of that section as brother of Balbhaddar Singh, notwithstanding the adoption of Balbhaddar Singh, though it had recently been held that the legatee of a taluqdar who took under a bequest taking effect before the passing of Act I

1905

SHRO SINGH  
v.  
RAGHUBANS  
KUNWAR.

(1) (1883) L. R., 11 I. A., 51 (55); I. L. R., 10 Calc., 511, 517, 518.

(2) (1890) L. R., 17 I. A., 173; I. L. R., 18 Calc., 111.

(3) (1893) L. R., 20 I. A., 77; I. L. R., 20 Calc., 649.

(4) (1902) L. R., 30 I. A., 27 (30); I. L. R., 25 All., 145 (150).

1905

SHEO SINGH  
v.  
RAGHUBANS  
KUNWAR.

of 1869 was not a legatee within the meaning of section 22. See *Balraj Kunwar v. Jagatpal Singh* (1), and Act I of 1869, sections 14 and 15. But if Hindu law were held to apply, the custom set up by the appellant excluding females was proved, and in that case the appellant was still the next heir on the death of Balbhaddar Singh.

Assuming, however, as held in the case of *Balraj Kunwar v. Jagatpal Singh*, that Act I of 1869 did not apply, the appellant was entitled to succeed to the taluq in dispute under the terms of the primogeniture sanad granted to Girwar Singh, which, it was submitted, regulated the descent of the taluq. The effect of Lord Canning's proclamation of 15th March 1858 was that all land in Oudh was confiscated and became the property of Government, and claimants had thenceforward to show title through the Government: see *Mulka Jahan Sahiba v. Deputy Commissioner of Lucknow* (2) and *Mirza Jehan Kudr Bahadur v. Afsur Bahu Begum* (3). As to the sanad, it was undoubted that it had been granted; it was proved by a certified copy which had been rightly admitted in evidence when produced in the Judicial Commissioner's Court; and from the other documentary evidence which is referred to and considered in the judgment of the Subordinate Judge, and also from the circumstances of the date of the sanad and of the nature of Girwar Singh's reply on being asked if he wished to have it, the form and effect of the sanad were sufficiently shown to make it clear that it was a sanad under which the taluq would descend to a single male heir by the law of primogeniture. Reference was made to the Oudh Blue Book for 1859, the circular at page 28; the Government Circular of 18th January 1860; and Sykes' Taluqdari Law, pp. 385, 386, 389 and 391: and it was submitted that the appeal should be allowed on this ground.

*Haldane K. C., W. C. Bonnerjee and G. E. A. Ross*, for the respondent contended that the succession to the taluq was governed by the Hindu law, and not by the provisions of section 22 of Act I of 1869, which was not applicable to the

(1) (1904) L. R., 31 I. A., 132 (143); (2) (1879) L. R., 6 I. A., 63 (73).

I. L. R., 26 II., 393 (406).

(3) (1878) L. R., 6 I. A., 76 (82); I. L. R., 4 Cal., 727 (731).



1905

SHEO SINGH  
v.  
RAGHUBANS  
KUNWAR.

case: see *Balraj Kunwar v. Jagatpal Singh* (1). By the Hindu law the respondent as the widow of Balbhaddar Singh would be entitled to succeed to the estate as next heir. There had been concurrent findings of the two Courts in India that Balbhaddar Singh had been duly adopted, and that the custom set up by the appellant excluding females was not proved. Even if, therefore, the succession were held to be governed by section 22 of Act I of 1869, the respondent was not precluded from inheriting, and the appellant, owing to the adoption, was no longer Balbhaddar Singh's brother within the meaning of clause (6) of that section: and the respondent was in that case still the nearest heir to the taluq.

As to the contention that the succession was to be regulated by the sanad said to have been granted to Girwar Singh, there was no proof that such a sanad ever was granted. No reference was made to it in the report dated 3rd January 1865 to the Deputy Commissioner of Girwar Singh's death, as would have been done had such a sanad existed. It was not sufficiently proved by the secondary evidence adduced in support of it: the copy produced was not certified in accordance with law, and ought not to have been admitted in evidence; it should appear on the face of the document that it was a certified copy. Reference was made to the Evidence Act (I of 1872), sections 61, 63, 76 and 91. The contention is, moreover, a new case which had not been put forward by the appellant in his written statement, nor in the proceedings he took to obtain possession of the estate, nor had any issue ever been suggested or settled on it. He should, therefore, not be allowed to raise it now, nor should the appeal be decided upon it. Even assuming that such a sanad was granted to Girwar Singh, it was submitted that for the reasons given by the Courts below the Government had no power to grant it. When they had once granted the taluq to Gajraj Singh and his heirs there was nothing left to give to Girwar Singh, and the latter, one of the heirs who had taken the taluq under the former sanad had no power to surrender it and accept another grant to himself and his heirs. Moreover at the date of the sanad the Government

1905

SHEO SINGH  
v.  
RAGHUBANS  
KUNWAR.

could not in their executive capacity have created any estate descendible otherwise than by Hindu law. The appeal therefore ought on that ground to be dismissed. The respondent in any case was entitled to a decree for the property claimed in the plaint as being not part of the taluq in dispute.

Mr. *DeGruyther* replied, citing, as to the power of the Government to make the grant, the Crown Grants' Act (XV of 1895); and as to the setting up of a new case *McClellan v. McKay* (1) showing that the Privy Council will exercise their discretion in deciding a case on its merits without regarding strictly the precise terms of the pleadings. *Har Narain Singh v. Chaudhrani Bhagwant Kuar* (2); and *Ibrahim Ali Khan v. Ummat-ul-Zohra* (3), were also referred to. The respondent was fully aware that the primogeniture sanad granted to Girwar Singh was relied on by the appellant, as it appeared in his list of documents.

1905, May 18th. The judgment of their Lordships was delivered by SIR ARTHUR WILSON—

This appeal relates to taluqa Mahewa, and the conflicting claims to succeed to it of those who allege themselves to be the heirs of the last owner, Thakur Balbhaddar Singh, who died on the 12th December 1898.

Before the annexation of Oudh, and the proclamation of confiscation, the taluqa was held by Thakur Gajraj Singh, and with him summary settlement was made. To him, it was not disputed, was also granted a sanad of the 19th October 1859; and as will be shown later on, that sanad must have been one in the form in use under the sanction of Government at the time when it was granted, that is to say, a sanad to the grantee and his heirs, without indication of the line of inheritance. These are the material facts down to the death of Gajraj, which occurred in January 1860.

Gajraj at his death left surviving him two brothers, Girwar Singh and Dunia Singh, of whom the former was childless, while the latter had two sons, Balbhaddar Singh and Sheo Singh. Girwar succeeded to the property on the death of

(1) (1878) L. R., 5 P. C., 327 (337). (2) (1891) L. R., 18 I. A., 55; I. L. R., 13 All., 300.

(3) (1896) L. R., 24 I. A., 1 (10); I. L. R., 19 All., 267 (277).

1905

SHEO SINGH

v.

RAGHUBANS  
KUNWAR.

Gajraj, and remained in possession until his death in 1865. He died childless, and by his will he left the estate to his nephew Balbhaddar, who accordingly succeeded him. During Balbhaddar's time of possession the Oudh Estates Act (I of 1869) was passed. In the lists framed under section 8 of that Act the name of Gajraj, though he had long been dead, and though another descent had in the meantime occurred, was inserted in the first list as a person to be considered as a taluqdar, and in the second list as one whose estate according to the custom of the family ordinarily devolved upon a single heir. He was not in the third list. And it is a matter of familiar knowledge that such entries of dead men's names in the lists were not uncommon.

Balbhaddar remained in possession of the estate until his death childless, which took place, as already stated, on the 12th December 1898. And he left surviving him his widow and his brother.

The usual controversies followed before the Revenue authorities upon the application for mutation of names, in which the brother was successful. And ultimately the present suit was brought by the widow, the now principal respondent, against the brother, now represented by the appellant, to recover the estate.

The plaintiff based her case upon the ordinary rules of Hindu law; under which she claimed to succeed as heir to her husband; and of course, if those rules are applicable to the case, she was right. She further alleged that Balbhaddar had been adopted by his uncle Girwar.

The defendant denied the adoption and made two specific answers to this claim: first, that by the custom of the family females were excluded from inheritance; secondly, that the succession was governed by section 22 of the Oudh Estates Act, and that under that section the brother was entitled in priority to the widow.

These pleadings raised two definite questions of fact, one, as to the custom excluding females from inheritance, the other, as to the adoption of Balbhaddar by his uncle Girwar. On both of these questions of fact the Subordinate Judge who heard

1905

SHEO SINGH  
v.  
RAGHUBANS  
KUNWAR.

the case decided in favour of the respondent, holding that the custom was not proved, and that the adoption was. He thought that the right of succession was governed by the ordinary Hindu law, and that even if it fell under the Act, Balbhaddar having been adopted by his uncle Girwar, Sheo Singh, his brother by birth, was no longer his brother in the eye of the law but his cousin, and, though undoubtedly the nearest male heir, came in after and not before the widow in the list of heirs under section 22. And he gave a decree in favour of the plaintiff, now the first respondent.

Against this decree an appeal was brought to the Court of the Judicial Commissioner. That appeal was heard by two learned Judges. They agreed with the Subordinate Judge as to the custom and as to the adoption. They thought that the succession was governed by section 22 of the Act. One of the learned Judges agreed with the Subordinate Judge in thinking that Balbhaddar's adoption by his uncle Girwar precluded Sheo Singh, his brother by birth, from succeeding as a brother in priority to the widow; the other learned Judge differed on this last point. And there being this difference between the learned Judges on a question of law, the appeal to them was dismissed and the decision of the First Court affirmed. It is against that decision that the present appeal has been brought.

The questions as to the alleged custom and as to the adoption which occupied so much of the time and attention of the Courts in India have been disposed of by concurrent findings of those Courts; and their Lordships have not been asked to re-open them.

The question upon which the learned Judges differed, as to the meaning of "brother" in section 22 of the Oudh Estates Act, only became material because it was considered that the succession to the taluqa on the death of Balbhaddar was governed by that section. But that could only be if Balbhaddar were regarded as a logatee of a taluqdar as the term is used in the section. In *Balraj Kunwar v. Rae Jagatpal Singh* (1), a case decided by this Board after the present case was disposed of in India, it was held that a logatee who succeeded as such

before the passing of the Act is not a legatee within its meaning.

The real contention before their Lordships on behalf of the appellant was that, assuming the Act not to be applicable to the case, the succession to the taluqa is governed, not by the ordinary rules of Hindu law, but by the terms of the sanad under which it is held, that that sanad is one granted to Thakur Girwar in substitution for the earlier sanad in favour of Gajraj, and that by the terms of Girwar's sanad the taluqa descends, on the death of the holder, to the nearest male heir according to the rule of primogeniture. Therefore, it was contended, the appellant was entitled to succeed on the death of Balbhaddar to the exclusion of his widow. It was not disputed that Sheo Singh was the nearest heir male of Girwar and Balbhaddar, whether there was an adoption of the latter or not.

In order to make this aspect of the case quite clear it will be well to refer very shortly to one or two points in the development of the policy of Government in connection with the Oudh taluqas. This is matter of history, and the whole story is to be found in Sykes' Compendium. It is sufficient here to notice two stages in that development. Down to the end of 1859, the sanads granted for taluqas of the class to which the present belongs, that is to say taluqas which by family custom descended to a single heir, but not necessarily to a male heir under the rule of primogeniture, were in a form sanctioned by the Government of India and printed at page 385 of Sykes' Compendium. It is a grant to the taluqdar and his heirs, without specifying any particular rule of inheritance. These sanads appear to have been issued through the then Chief Commissioner, Mr. (afterwards Sir Charles) Wingfield, whose name they bear. The sanad to Gajraj must from its date have been of this kind.

In 1860 a further development took place. It was considered desirable to encourage the settlement of taluqas so that they should descend to male heirs only, under the rule of primogeniture. And a new form of sanad was approved by Government, embodying this rule of descent, which is printed

1905

SHEO SINGH  
v.  
RAGHUBANS  
KUNWAR.

1905

SHEO SINGH  
v.  
RAGHUBANS  
KUNWAR.

at page 386 of the same book. Such sanads appear to have been issued by Mr. (afterwards Sir George) Yule, then officiating as Chief Commissioner. It was further thought desirable to communicate the new form of sanad to taluqdars already holding sanads in the older form, to point out its advantages, and to offer to such persons the option of taking the new type of sanad in place of the old. This appears to have been carried out through the usual channel of communication, the local officers of Government. And from an official paper quoted at pages 100 and 101 of Sykes' Compendium, it would appear that a large number of such exchanges were carried out.

With regard to the case as now presented on behalf of the appellant, it was objected in the first place that this was a new case, that in the mutation proceedings the defendant based his claim on other grounds, that in his written statement in this suit no sanad to Girwar is mentioned, and that no specific issue was settled as to such a sanad. And all this is true. But the issues as settled were sufficiently wide to cover the case now presented. And what is of more moment, from an early stage of the case down to the latest, all parties appear to have been alive to the importance of such a document if it was in fact granted, and if its contents could be ascertained. The defendant included it in his first list of documents, he tried hard to obtain its production, he endeavoured to trace it into the possession of the other side. He produced evidence to show that there was such a sanad. He sought to show its contents by means of proof or of presumption, but in this latter endeavour he failed in the first Court. Each Court considered both the question of the grant of the alleged sanad and its legal bearing upon the rights of the parties.

Their Lordships are satisfied that the respondents are not unfairly taken by surprise by the manner in which the case is now presented, and that there is no danger of doing injustice by disposing of this appeal upon that footing.

The next question is whether Girwar did in fact accept such a sanad. It was proved at the trial that he received the invitation to do so, addressed to him in common with other taluqdars whose titles were similar to his own, and who had

received from Sir Charles Wingfield sanads in the earlier form. It was proved that on the 19th April 1861 he elected to accept the new form of sanad, and applied for it to the proper authority. It was proved that in 1873 his successor, Balbhaddar, borrowed money from the Land Mortgage Bank on mortgage of the taluqa in question, and that on that occasion his title deeds were produced and examined by the Agent of the Bank. And in the mortgage deed then executed by Balbhaddar it is recited that "Raja Girwar Singh was proprietor at the time of his death. . . . The estate, villages, hamlets, hypothecated under this deed, were granted under the Government sanad, sealed and signed by George U. Yule, Esq., Officiating Chief Commissioner of Oudh." Neither of the Courts in India seem to have entertained any doubt that such a sanad was in fact issued. And their Lordships are of opinion that that fact has been established.

Then have the terms of the sanad been ascertained? It is clear that nobody has been able to find the original document, and the case is one in which, as was recognised in both Courts, secondary evidence of the contents was admissible. In the Court of the Subordinate Judge the defendant, in spite of his efforts, failed to procure such evidence. But while the case was before the Court of the Judicial Commissioner, the defendant produced what the learned Judges state to be a certified copy purporting to be a copy of the sanad in question, obtained, it would seem, from one of the offices of Government. The learned Judges admitted this document in evidence, and their Lordships think rightly. It proves to be the ordinary form of primogeniture sanad as printed at page 386 of Sykes' Compendium. And that the sanad must have been in that form is confirmed by the date at which Girwar asked for it, the 19th April 1861, and by the recital in the mortgage deed already mentioned that the sanad was one issued by Mr. Yule. Their Lordships think the terms of the sanad to Girwar are proved.

About the meaning of this sanad, and about its effect, if the right of succession is governed by it, there is no room for doubt. It says expressly—"It is another condition of this grant that in the event of your dying intestate, or of any of

1905

SHBO SINGH

v.

RAGHUBANS  
KUNWAR.



1905

SHRO SINGH  
v.  
RAGHUBANS  
KUNWAR.

your successors dying intestate, the estate shall descend to the nearest male heir according to the rule of primogeniture."

But it was held by both Courts in India that such a *sanad* could not in point of law operate to substitute the line of descent prescribed by it for the line prescribed by the earlier *sanad*. The Subordinate Judge said:—"Sanad was granted to Gajraj Singh, and he could have consented to have it changed, and if he had done so, it would have been binding on his heirs and successors, but if Girwar Singh got it converted into a primogeniture *sanad*, he could not, by doing so, himself derive any benefit or confer any benefit on his heirs and successors."

In the Appeal Court the view was thus expressed:—"The fact which renders the *sanad* on which the defendant relies absolutely useless is the fact that the estate had already been conferred by the Government on Gajraj Singh and his heirs for ever when it professed to give it to Girwar Singh and his heirs for ever."

Their Lordships are unable to concur in these views. They involve two points, the power of Girwar to surrender the estate conveyed by the old *sanad* and the power of the Government to grant that conveyed by the new. The Subordinate Judge dwells on the first point, the learned Judges in appeal on the second. As to the power of Girwar, it appears to their Lordships that when he succeeded as the heir of Gajraj, he became the absolute owner of the taluqa with full power of alienation, and their Lordships see nothing to prevent his entering into an arrangement with the Government by which he surrendered the estate he held under the first *sanad* and received it back again under the terms of the second, assuming that the Government on its side had the necessary power.

With regard to the power of the Government to do what it purported to do, the objection taken in the appeal Court in India was that the Government having granted the estate in 1859 to Gajraj and his heirs, had nothing left to grant to Girwar at a later date. But that objection does not seem to apply to a transaction by which Girwar, the person absolutely entitled by it to everything that passed under the earlier

grant, surrendered it in consideration of a re-grant of the same estate on new terms.

In the argument before their Lordships another objection to the powers of Government was raised. It was suggested that though in the earlier troublous times many things were effectively done by Government as acts of State, still, in or after 1861 (which is the earliest possible date for Girwar's sanad, for it was in April of that year that he asked for it) no executive act of the Government could have created an estate descending by any rule of inheritance other than that laid down by the law, and the law in the present case would be the Hindu law.

Whatever force such a contention might otherwise have had appears to their Lordships to be removed by the Act to which their attention was called, Act No. XV of 1895 (The Crown Grants' Act, 1895). That Act recites, amongst other things, that doubts have arisen as to the power of the Crown to impose limitations and restrictions upon grants and other transfers made by it or under its authority, and it is expedient to remove such doubts. And section 3 enacts that "all provisions, restrictions, conditions, and limitations over contained in any such grant or transfer as aforesaid shall be valid and take effect according to their tenor, any rule of law, statute, or enactment of the Legislature to the contrary notwithstanding."

The present appeal relates mainly to taluqa Mahewa, and the argument before their Lordships dealt only with it. The principle adopted in this judgment only applies to that taluqa, including, of course, any property that may have accreted to it since the date of the sanad under which it is held. It has been pointed out by Counsel that the suit out of which the appeal arises related also to property said to have been acquired apart from the taluqa.\* It seems clear that their Lordships have not materials before them to enable them to define what property, if any, other than the original contents of the taluqa now passes as part of it.

1905

SHRO SINGH  
v.  
RAGHUBANS  
KUNWAR.

\* See paragraphs 8 and 9 of the plaint; Record 2.

1905

SHOO SINGH

v.

RAGHUBANS  
KUNWAR.

It would hardly be safe to rely for the present purpose upon the admission mentioned at page 887 of the record.

Their Lordships will therefore humbly advise His Majesty to make a declaration that the taluqa Mahowa, as constituted at the date of the sanad, with accretions (if any) or properties (if any) appurtenant to the taluqa, has passed to the appellant, and that as to any other property of the deceased the decrees of the Courts below are not affected, and to order that it be left to the Court of the Judicial Commissioner, if it be found that there is real controversy on the point, either itself to determine what property falls under one category and what under the other, or to remit the case for inquiry to the Court of the Subordinate Judge, and to order that so far as may be necessary to give effect to the first part of the foregoing declaration the decrees of the Courts below ought to be discharged, and the suit dismissed, but that, in the special circumstances of the case, the costs of the parties on both sides in those Courts should be paid out of Balbhaddar's estate. The first respondent will pay the appellant's costs of this appeal.

The second respondent, another son of Shoo Singh's, was, on his own application, added as a party by Order in Council, but he has not lodged any case, nor did he appear by Counsel before their Lordships. There will be no order as to the costs of his application, and any costs incurred by him in the appeal must be borne by himself.

*Appeal allowed.*

Solicitors for the appellant—*Downing, Handcock, Middleton & Lewis.*

Solicitors for the respondent—*T. L. Wilson & Co.*

J. V. W.

RITRAJ KUNWAR (PLAINTIFF) v. SARFARAZ KUNWAR (DEFENDANT).

[On appeal from the Court of the Judicial Commissioner of Oudh].

*Accretion—Bengal Regulation No. XI of 1825, section 4, paragraphs 1 and 2—Act No. XVIII of 1876 (Oudh Laws Act)—Riparian proprietors—Change in course of river—Gradual and imperceptible accretion—Alteration of land by sudden change of course of river or by violence of its stream—Ownership not changed—Tidal and non-tidal rivers.*

The appellant sued to recover possession of a large extent of land which she claimed as an accretion to her estate of Kamyar lying on the south side of the river Gogra, a non-tidal river, by reason of a change in the channel of the river, the effect of which was, as stated in the plaint, that "the northern channel receding gradually to the north the said land was added to Kamyar as alluvial accretion towards the south of the said channel." It was found by the Judicial Committee that the predecessors of the respondent were the original owners of the land claimed; that there had been no slow and gradual pushing northward of the northern boundary of the appellant's land; and that there was still a channel of the river between the properties of the appellant and respondent, although the main stream had shifted to the north. *Held* that it was not a case of accretion by gradual slow and imperceptible means, in which, as laid down in *Lopez v. Muddun Mohan Thakoor* (1), the accreted land belongs to the owner of the adjoining land; but the principle applicable to it was that laid down in paragraph 2 of section 4 of Regulation XI of 1825 (which was applied to Oudh by Act XVIII of 1876), that in cases in which a river by a sudden change in its course or by the violence of its stream separates land from one estate and joins it to another without destroying its identity and preventing the recognition of the land so removed, in such cases the land on being clearly recognized remains the property of the original owners—in this case the respondents. *Mayor of Carlisle v. Graham* (2) followed.

The principle of that case, which had reference to a tidal river is equally applicable to a non-tidal river.

APPEAL from a judgment and decree (10th October 1898) of the Court of the Judicial Commissioner of Oudh, reversing a decree (13th March 1897) of the Subordinate Judge of Gonda and dismissing the appellant's suit with costs.

The facts are fully stated in the judgment appealed from delivered by the Court of the Judicial Commissioner (Mr. ROSS SCOTT, Additional Judicial Commissioner, and Mr. W. BLERNERHASSETT, Judicial Commissioner) which was as follows:—

"This suit was instituted on 25th February 1907 in the

*Present*:—Lord MACNAGHTEN, SIR FRED NORTH, SIR A. BREW SCOBLE, and SIR ARTHUR WILSON.

(1) (1870) 13 Moore's I. A., 467; 5 B. L. R., 521. (2) (1869) L. R., 4 Exch., 361.

P. C.  
1905  
May 19, 23.  
June 29.

1905

RITRAJ  
KUNWAR  
v.  
SARFARAZ  
KUNWAR.

Court of the District Judge of Lucknow, and in it the plaintiff, Thakurain Ritraj Koer claims possession of 62½ acres of cultivated land, and 2,000 bighas of uncultivated land as an alluvial accretion to her village of Kamyar which is in the Bara Banki District. The river Gogra there forms the boundary between the plaintiff's and defendant's villages and between the Bara Banki and Gonda Districts. After a full enquiry, from which the District Judge of Lucknow found that the land in suit was situated on the Gonda or north side of an arbitrary line fixed by a Government order of 1879 as the boundary between the Bara Banki and Gonda Districts, the plaint was returned for presentation to the proper Court. It was then presented to the Court of the District Judge of Fyzabad, who dismissed the suit on the finding that the disputed land was situated in the Bara Banki District. On appeal by the plaintiff, this Court, by its order dated the 22nd December 1891, remanded the case to the District Judge of Fyzabad for trial on the merits. For nearly three years it remained in the Court of the District Judge of Gonda and was transferred on the 10th December 1894 to the Subordinate Judge of Gonda, who on the 13th March 1897 gave the plaintiff the decree from which the defendant now appeals.

"In order to make the facts and arguments clear, it is necessary to refer to some previous litigation. At settlement, Thakur Raghubir Singh, who is now represented by the defendant, Thakur Jagmohan Singh, claimed possession of certain lands against Narendra Bahadur Singh, Raja of Harha, and against Sher Bahadur Singh, the father-in-law of the plaintiff. He claimed from the Raja of Harha 4,000 bighas on the north of what was then the main stream of the Gogra, and Mr. McMinn, the Settlement Officer, dismissed the claim on the ground that in 1266 *Fasli* (1859 A. D.) the main channel of the river was the boundary between Bara Banki and Gonda, and as the *sanads* granted in that year abolished the custom of *dhar-dhar*, the same channel continued to be the boundary, although the main channel had shifted southwards. In the Judgment, Mr. McMinn stated that channel No. 2, which was

\* A. System that the boundary of estates should vary with the main stream of a river.

1905

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RITRAJ  
KUNWAR  
v.  
SARFARAZ  
KUNWAR.

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then, and had been for three years previously, the main stream of the Gogra, was a mere 'soti' in 1863-64. He found that channel No. 1 was in 1230 *Fasli* abandoned by the river, which then took a course one and a half *kos* to the north and that the main stream flowed in channel No. 5 in 1266 *Fasli*. Thakur Raghubir Singh's claim for possession of land in the possession of Sher Bahadur Singh was also dismissed. On appeal, Colonel MacAndrew, Commissioner of Lucknow, remanded the case of Thakur Raghubir Singh *versus* the Raja of Harha, for findings on issues as to the action of the river between 1266 *Fasli* and 1276 *Fasli* and directed that a sketch map showing the position of the five channels mentioned in the Settlement Officer's judgment, should be prepared. Mr. Arthur Harington, who was then Settlement Officer, complied with that order in his judgment of the 10th February 1870, and submitted a tracing of the survey map on which he showed the position of the five channels referred to by Mr. McMinn. A copy of it has been filed in this suit and marked P 2. Mr. Harington concurred in the opinion of Mr. McMinn that in 1266 *Fasli* the main stream of the river flowed in channel No. 5 and that between 1266 and 1272 *Fasli* (1859 to 1865 A. D.) it had encroached gradually but slightly to the north changing south suddenly in 1272—73 *Fasli* to channel No. 2, where it then was. On the tracing of the survey map he marked by a dotted line what is now admitted in this suit to have been the boundary between the plaintiff's and defendant's villages in 1266 *Fasli* and which was then a high or well defined bank. This appears as a black dotted line in the maps which have been filed in this suit. Colonel MacAndrew finally dismissed the appeal finding that the river was the boundary and as the actual edge at the time of the Summary Settlement was not ascertainable in consequence of the change in the main stream, the boundary of the Harha estate must be held to extend to the south bank of bed No. 5. The land then in dispute was south of this bank and north of channel No. 2 which was the main stream.

"On the 14th December 1876 the Raja of Harha instituted a suit against the present defendant in which he claimed 9,000 *bighas* of land lying south of what was stated to be the main

1905

RITRAJ  
KUNWAR  
v.  
SARFARAZ  
KUNWAR.

stream of the Gogra, on the allegation that it was an alluvial accretion to the plaintiff's village. The Commissioner and Judicial Commissioner decreed the plaintiff's claim on the finding that the land in suit was a gradual accretion to the plaintiff's estate and was incapable of recognition. On the 17th November 1881 their Lordships of the Privy Council dismissed the appeal of the defendant, and their decision is relied on by the plaintiff to support the contention that the owner of lands south of bed No. 5 is entitled to claim all land up to the south bank of the main stream wherever it may be. That contention appears to have been accepted by the Lower Court, but I do not think that their Lordships' decision supports it. All that was decided was that there was evidence to support the findings of the Lower Courts. No new principle of law was introduced or established by the decision, nor is there any passage in it by which the law as previously determined by their Lordships was modified. In her plaint the plaintiff alleges that she is the taluqdar of Kamyar in the Bara Banki District, and the defendant the taluqdar of the villages of Raksaria, Pura Angad, and Bharsara in the Gonda District, and that in accordance with the decisions in the cases to which I have referred, she is entitled to obtain possession of all the land which was added to Kamyar by gradual accretion and lying between the dotted line in the settlement map and the channel of the river to the north of it. She further alleges that in 1884 the defendant interfered with her possession, and on the 1st March 1884 the Extra Assistant Commissioner, Kazi Nur-ud-din, passed an order under section 145 of the Code of Criminal Procedure, which deprived her of possession. She prayed for possession of the land south of the northern channel situated in the villages of Raksaria, Pura Angad, and Bharsara, and for a decree for mesne profits. She named the village of Dulapur also, but admittedly it disappeared many years ago. On 13th September 1890 her pleader stated that the suit was for possession of the land of which the Extra Assistant Commissioner had given the defendant possession in 1884, and I think from paragraph 11 of the plaint and other proceedings in this case that the suit was for land which formed part of the defendant's villages of Raksaria, Pura Angad and Bharsara,



1905

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RITRAJ  
KUNWAR  
v.  
SARFARAZ  
KUNWAR.

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but which had been submerged and re-formed on the south of the northern channel and north of the dotted line marked on Mr. Harington's tracing of the survey map in 1870, as the boundary between the Districts of Gonda and Bara Banki. I have omitted the portions of the plaint which it is unnecessary to consider in this appeal. The material pleas in the defendant's written statement are a denial that the plaintiff had ever been in possession of any of the land in suit which is separated from Kamyar by the main navigable stream of the Gogra, that between the years 1874 and 1882 the Gogra flowed in channel No. 5 to the north of the dotted line, but greatly extended its breadth towards the north, retaining however the dotted line as its southern bank and submerging gradually the defendant's villages, so that by the end of the year 1882 the village sites of Bharsara and Raksaria only remained, while the site of Pura Angad and the whole of the land of that village, with the exception of 62 bighas 7 biswas were swept away. Subsequently to 1882 the river decreased in breadth and gradually restored the submerged land, so that in 1886 it returned almost to its former bed in channel No. 5. In the rainy season of 1886 the river cut away a portion of the plaintiff's land on the south side of it, so that 1,491 bighas of Raksaria and 464 bighas 6 biswas of Pura Angad, of the original areas of 1,692 bighas 1 biswa and 929 bighas 3 biswas, remained or were reformed. In addition, to other issues the Court below framed the following:—

"Is the land in suit south of the channel named *soti* No. 5?

"Which is channel No. 5 and where is it at present?

"Has the land in suit been added to the plaintiff's village by gradual accretion?

"For the purpose of determining the position of the channels of the river and of the land in suit, Salam-ul-Haq was appointed an Amin, and with his report submitted a map on which he purported to show the main channel of the Gogra as flowing for the most part below Mr. Harington's dotted line, the diluviated land within red lines. The whole of the land was stated by him to be 10,138 acres. I have compared this with the tracing of the Survey map prepared by Mr. Harington in 1870,

1905

RITIAJ  
KUNWAR  
v.  
SARFAHAZ  
KUNWAR.

and find that the old channels are correctly shown between the dotted lines on it. The dotted line which was taken to be the boundary between the Gonda and Bara Banki Districts, is also correctly reproduced, but the local inspection made by a local pleader, Babu Rajendra Nath, for the purpose of testing the Amin's map, in my opinion, leaves no doubt that the Amin falsely showed the main stream of the river a great deal south of where it actually was. The Amin's map was prepared in February or March 1893, and Babu Rajendra Nath tested it on the 17th June 1893. The appellant's learned counsel attempts to explain the difference between the position of the main channel as shown on the Amin's map and its position as found by Babu Rajendra Nath, by the suggestion that between March and the 17th June the river had become swollen by the melting of the snows and changed its course to the north, but I cannot believe that such a river as the Gogra ever changes its main channel at any time other than during the rainy season. Relying on the result of Babu Rajendra Nath's report and the evidence recorded, the Subordinate Judge found that the main channel of the river flowed in the direction marked G. Z. H. D., and gave the plaintiff a decree for 2,062 acres of the 10,138 acres shown on the Amin's map, the exact area decreed to be determined and demarcated in the Execution Department. From that decree the defendant has appealed. It is based on the finding that the whole of the area bounded by the red line has been added by gradual accretion to the plaintiff's village.

"The question to be decided in this appeal is not where the main channel of the river was in 1893 or 1895, but where it was when the plaintiff's suit was instituted on the 25th February 1887, or its position in 1884 when the defendant was put in possession of the 2,062 bighas, as the plaintiff states that it is these 2,062 bighas which she now claims. The other questions to be decided are :—

"1. Was the land in suit north or south of the main channel of the river on the 25th February 1887?

2. Was the land in suit to the plaintiff's land south of the dotted line shown on the map, and was it a portion of the defendant's land which was submerged and reformed on its old

1905

RITRAJ  
KUNWAR  
v.  
SARFARAZ  
KUNWAR.

site, so as to be capable of recognition? The law to be applied is to be found in Regulation XI of 1825, the 2nd section of which provides that whenever any clear and definite usage of *shikast-paiwast* respecting the disjunction and junction of land by the encroachment or recess of a river, may have been immemorially established, &c., the usage so established shall govern the decision of all claims and disputes relative to alluvial land between the parties whose estates may be liable to such usage. In this suit no such immemorial custom or usage is relied on, as it is admitted that if the custom known as *dhar-dhura* ever existed it was abolished by the sanads of the plaintiff and defendant. The plaintiff relies on the first paragraph of section 4 of the Regulation, which is to the effect that when land may be gained by gradual accretion from the recess of a river, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed. The 2nd paragraph of the same section provides that the above rule shall not be considered applicable to cases in which a river by a sudden change of its course may break through and intersect an estate, without any gradual encroachment, or may by the violence of stream separate a considerable piece of land from one estate and join it to another estate without destroying the identity, and preventing the recognition of the land so removed. In paragraph 5 it is provided that in cases of claims and disputes regarding land gained by alluvion, or by the dereliction of a river, which are not provided for by the other rules contained in the Regulation, Courts of Justice, in deciding upon such claims and disputes, shall be guided by the best evidence they may be able to obtain of established local usage, if there be any applicable to the case, or if not, by general principles of equity and justice. The meaning and effect of the Regulation were considered by their Lordships of the Privy Council in the case of *Imam Bandi v. Hargovind Ghose* (1) in which their Lordships stated that the question was to whom did the land which had been inundated about the year 1801 and remained covered with water till 1801, belong? The answer was, by the Regulation, that whoever was the owner then, was the owner

(1) (1848) 4 Moore's I

1905

RITRAJ  
KUNWAR  
v.  
SARFARAZ  
KUNWAR.

while it was covered with water and after it became dry. That case established the proposition that when land becomes submerged, it does not cease to be the property of the original owner and remains his property after the water recedes and the land is left dry again. The Regulation was again considered by their Lordships in the case of *Lopez v. Muddun Mohan Thakoor* (1) when they laid down the principle 'founded in universal law and justice—that whoever has land, wherever it is, whatever be the accident to which it has been exposed, whether it be a vineyard which is covered by lava or ashes from a volcano, or a field covered by the sea or by a river, the ground, the site, the property remains in the original owner.' They at the same time declared another principle recognized in English law to the effect that 'where there is an acquisition of land from the sea or river by gradual, slow, and imperceptible means, there, from the supposed necessity of the case, and the difficulty of having to determine year by year to whom an inch, or a foot, or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land.' The defendant's contention in that case appears to me to have been what is really the plaintiff's contention in this case, namely, that land, having been wholly submerged so as to make her land the river boundary, the subsequent recession of the river has caused a gradual accretion to her land and an increment by accession to her estate, notwithstanding that the land has been reformed on the ascertainable and ascertained site of the defendant's villages, and their Lordships observed that clause 2 of section 4 of the Regulation 'refers simply to cases of gain, of acquisition by means of gradual accession,' the *incrementum latens* of the Civil Law. They further observed that what the Legislature was dealing with in clause 2 of section 4 of the Regulation was 'the gain which an individual proprietor might make from that which was part of the public territory, the public domain not usable in the ordinary sense, that is to say, the sea belonging to the State, and the river belonging to the State; this was a gift to a person whose estate lay upon the river or lay upon the sea, and of that which, by accretion, became valuable

1905

RITRAJ  
KUNWAR  
v.  
SARFARAZ  
KUNWAR.

and usable out of that which was in a state of nature neither valuable nor usable. On the words of the section itself, if the ownership of the submerged site remains as it was, it is difficult to see why a deposit of a alluvion directly upon it is not at least as much an accretion and annexation vertically to the site as it would be an accretion and annexation longitudinally to the river frontage of the adjoining property. The site is the property, and the law knows no difference between a site covered by water and a site covered by crops, provided the ownership of the site be ascertained.'

"In the case of *Nogendur Chunder Ghose v. Mahomed Esof* (1) their Lordships made similar observations to the effect—

'1. That there is nothing to show that the first rule in section 4 of the Regulation contemplates land other than that which commonly falls within the definition of 'alluvion,' viz., land gained by gradual and imperceptible accretion, the *incrementum latens* of the Civil Law; and

'2. That no express provision is made for the case of land which has been lost to the original proprietor by the encroachment of the sea or a river, and which, after diluviation, reappears on the recession of the sea or river.

'On the other hand, there is nothing to take away or destroy the right of the original proprietor in such a case; which must therefore be determined by the general principles of equity and justice under the 5th rule.'

"The same case also laid down that the identity of the site may be established by maps and ancient documents although by the long submergence of the land all external marks and means of identification have been obliterated and that 'it is not easy to see upon what principle a title to alluvion by gradual accretion should prevail against the original ownership established by identification of site; unless it be that, where the accretion is so gradual as to be latent and imperceptible during its progress, the law, on grounds of convenience, presumes incontrovertibly that no other ownership can exist, and so bars enquiry.' Such being the law in this suit, has the plaintiff proved her allegation?

1905

RITRAJ  
KUNWAR  
v.  
SARFARAZ  
KUNWAR.

land has gradually and imperceptibly accreted to her village of Kamyar? In my opinion she has entirely failed to do so. The exact position of the disputed land is not shown on any map except B 10, which was filed by the plaintiff and shows the disputed land north of Mr. Harington's 'dotted line.' There is no evidence that on the 25th February 1887 or in 1884, when the Extra Assistant Commissioner passed the order giving the defendant possession, the main channel of the river was north of the disputed land, and if it did not then flow north, it is not explained how the land was gained by gradual and imperceptible accretion to the plaintiff's village which was on the south. A1 and A2 are maps prepared by Kazi Nur-ud-din in connection with the quinquennial settlement of the disputed and other land settled with the defendant in 1885. These maps show the whole of the land to the north of the main stream of the Gogra, and the report accompanying them stated that wherever the old channel was, it was certainly south of the disputed land as shown in the maps. About the same time the tahsildars of Gonda and Bara Banki made an enquiry and prepared a map of which a copy is on the file and marked A3. This map is on the same scale as Mr. Harington's tracing of the Government Survey Map and shows correctly the position of the 'dotted line' and the channels as marked by him.

"The tahsildars reported that the main stream of the Gogra extended to the south of the dotted line, but flowed partly on the north of it, a portion of the old channel on the north being dry, and that the present plaintiff claimed all the land to the north of what was then the main stream, including a portion of the old bed No. 5 and up to a *nala* which she contended was the channel which flowed in bed No. 5 in 1870. How much of that land she now claims is not clear, but the maps and the report of the tahsildars show that she then claimed land on the site of the defendant's villages and on the north of the northern bank of the old bed No. 5. It has been established by the decisions of their Lordships of the Privy Council to which I have referred, that ~~the~~ cannot be supported unless and until it is proved ~~the~~ and was gained by gradual and imperceptible accretion an increment to her property. This she has failed

1905

RITRAJ  
KUNWARSARFARAZ  
KUNWAR.

to prove, and wherever the main stream flowed in 1884 or 1887, or in 1893, she is not entitled to obtain possession of any land which formed part of the defendant's estate, however long it may have been submerged and under water.

"It appears to me that the plaintiff's claim was based, in the first instance at least, on the fact that the main channel extended northwards and then receded, leaving the *nala* or small stream shown on the maps of the tahsildars and Kazi Nur-ud-din, where its extreme north limit had reached and on the mistaken belief that she could claim all land up to whatever might be the most northern stream of the river, whether that stream was the main channel or not and whether the land did or did not form part of the defendant's estate. She was probably led to that belief from the success of Narendra Bahadur Singh. Without asserting that the result of that case might possibly have been different had it been presented in a different form to the Courts, the two cases are not similar, as the maps show that while the river had extended northwards into a new channel it turned south again when approaching the plaintiff's and defendant's lands.

"It has not been proved that any of the land in suit was an alluvial accretion to the plaintiff's estate or that the south bank of channel No. 5 had receded northwards in 1884 or 1887, while the channel itself widened and spread northwards. The plaintiff has, in my opinion, failed to prove where the land in suit is situated or that she is entitled to it. From the form in which the decree was passed it would appear that the Lower Court was also unable to locate the disputed land. The plaintiff's suit should, I think, have been dismissed, and I would therefore allow the appeal and setting aside the decree of the Lower Court, dismiss the suit with costs in this and the Lower Court."

On this appeal

*W. C. Bonnerjee* and *Kenworthy Brown* for the appellant contended that the Court of the Judicial Commission was in error in holding that the land in dispute was a *res sita* of land belonging to the respondent. As the river at times diluviated both the land on its north, and on its south



1905

RITRAJ  
KUNWAR  
v.  
SARFARAZ  
KUNWAR.

sides, the land now claimed as existing on its south bank in 1884 might well be re-formation *in situ* of the appellant's estate of Kamyar. The principles on which the Judicial Commissioner's Court proceeded were inapplicable to the present case, which there was ample evidence to show was one of gradual and imperceptible accretion to the appellant's village. The correct principle to apply was that laid down in Regulation XI of 1825, section 4, paragraph 1. Reference was made to *Lopez v. Muddan Mohan Thakoor* (1), *Eckowree Singh v. Hira Lal Seal* (2), *Jaggot Singh v. Brij Nath Kunwar* (3) and Regulation XI of 1825, section 4, paragraphs 1 and 2.

*DeGruyther* for the respondent contended that it was for the appellant to do something more than show that her title was not free from doubt, and to give some acceptable explanation of the circumstances which led the Court below to its conclusion. *Raj Coommar Roy v. Gobind Coommar Roy* (4) and *Dinomoni Chowdhraïn v. Brojo Mohini Chowdhraïn* (5) were referred to. This the appellant had not done. It was submitted that the principle of law applicable to this case was that laid down in paragraph 2 of section 4 of Regulation XI of 1825. There was no gradual and imperceptible accretion shown here to bring the case within paragraph 1 of that section relied on by the appellant. The principle in paragraph 2 of section 4 should be applied to the facts of the case; and on those facts it was not proved, as it was necessary for the appellant to prove, that in 1884 the main channel of the river was north of the land in dispute. That land, though diluviated, remained all along the property of the respondent's predecessors in title. To allow the appellant to succeed in the appeal would be permitting her to acquire a title to lands the ownership of which was in the respondent, which under no circumstances could she do.

*Kenworthy Brown* replied.

• 1905, June 29th.—The judgment of their Lordships was delivered.

ANDREW SCOBLE :—

Moore's I. A., 467 (475); 5 B. L. R., 521 (526).

Moore's I. A., 136; 2 B. L. R., P. C. 4.

27 I. A., 81; I. L. R., 27 Cal., 768.

I. A., 140 (146); I. L. R., 19 Cal., 660 (670).

I. A., 34; I. L. R., 29 Cal., 187.

1905

RITRAJ  
KUNWAR  
v.  
SARFARAZ  
KUNWAR.

The parties to this appeal are the owners of estates situated on opposite sides of the River Gogra, in the Province of Oudh. The plaintiff, who is now the appellant, is the widow and heiress of Thakur Rachpal Singh, and as such the present holder of the taluqa of Kamyar in the District of Bara Banki, on the south bank of the river; and the defendant now on the Record (the respondent) is the widow of the son of the original defendant, Thakur Raghubir Singh, the Taluqdar of Dhanawan, in the District of Gonda, on the north bank of the river. The suit was brought to recover possession of certain alluvial lands, 2,062 acres and 10 roods in extent, which the plaintiff claimed as an accretion to her estate of Kamyar, by reason of a change in the channel of the river. The Subordinate Judge of Gonda made a decree in favour of the plaintiff, but this was reversed on appeal by the Judicial Commissioner, and the suit was dismissed with costs.

The law of India in relation to cases of this kind is contained in Bengal Regulation XI of 1825, which was applied to Oudh, with some unimportant modifications, by Act XVIII of 1876. The principle laid down in this Regulation, as Lord Justice James observes in giving the judgment of this Committee in the well-known case of *Lopez v. Muddun Mohun Thakoor* (1), "is one not merely of English law, not a principle peculiar to any system of municipal law, but it is a principle founded on universal law and justice; that is to say, that whoever has land, wherever it is, whatever may be the accident to which it has been exposed, whether it be a vineyard which is covered by lava or ashes from a volcano, or a field covered by the sea or by a river, the ground, the site, the property, remains in the original owner."

The first point to be ascertained, therefore, is, who was the original owner of the property in dispute in this suit; and on this point their Lordships are of opinion that there is no room for doubt that it was the property of the respondent's predecessor in title. Indeed, the plaint itself describes the property as "situate in the villages Raksaria, Bharsanda, Purnia, and Dulahpur," which admittedly form part of the respondent's

(1) (1870) 13 Moore's I. A., 407; 5 B. L. R., 521.

1905

RITRAJ  
KUNWAR  
v.  
SARFARAZ  
KUNWAR.

talua; and the Subordinate Judge is clearly mistaken in treating it as land "opposite" to those villages. For, not only is the statement in the plaint perfectly definite on the point, but it is repeated six years after the filing of the plaint, and after issues had been settled in which the question of the position of the land had been specifically raised, in a petition in which the plaintiff impeached the correctness in other respects of a map prepared for the suit by an *Amin*, or Commissioner, appointed by the parties. Presumably land situated in the respondent's villages would belong to the respondent whether covered by water or not, and however it might be intersected by the river in its devious course from year to year. This view was adopted by the local authorities in proceedings taken in 1883 under the Code of Criminal Procedure for possession of the land, and upon application to the Revenue officials in 1885 for demarcation of boundaries. And in July 1885 the Revenue Settlement of "the alluvial and diluvial land" of these villages was made with Thakur Raghubir Singh, the respondent's predecessor in title. It would require very strong evidence on the part of the appellant to disturb the conclusion thus arrived at, and no such evidence has been adduced.

The learned counsel for the appellant contended that, whoever may have been originally entitled to the land, it had gradually become accreted to the appellant's property by an alteration in the course of the river; and he relied, in support of his contention, on a passage in the judgment in the case of *Lopez v. Muddun Mohun Thakoor* (1) in which it is stated that "where there is an acquisition of land from the sea or a river by gradual, slow and imperceptible means, there, from the supposed necessity of the case, and from the difficulty of having to determine year by year to whom an inch or a foot or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land." Of the correctness of this proposition there can be no doubt; but in the opinion of their Lordships, it is entirely inapplicable to the present case. Here is no question of a gradual process of acquisition to be measured by the inch or the foot or the yard; here land to the extent of more than two

1905

RITRAJ  
KUNWAR  
v.  
SARFARAZ  
KUNWAR.

thousand acres is claimed, not on the ground that the action of the river has been slowly and gradually to push forward the northern boundary of the appellant's land, but that the northern channel of the river, however it may shift, must be taken to be that boundary. Nor is it the case here that the land laid bare by the alteration of the river's course adjoins the land of the respondent; on the contrary, the evidence is that there is still a channel of the river between the two properties, although the main stream has shifted to the north.

It appears to their Lordships that this is one of the cases provided for by the second clause of the fourth section of the Regulation, which enacts that the rule as to gradual accretion "shall not be considered applicable to cases in which a river, by a sudden change of its course, may break through and intersect an estate, without any gradual encroachment, or may, by the violence of the stream, separate a considerable piece of land from one estate and join it to another estate without destroying the identity, and preventing the recognition, of the land so removed. In such cases the land, on being clearly recognized shall remain the property of its original owner." This is in accordance with the English law, as laid down in the case of *The Mayor of Carlisle v. Graham* (1):—"All the authorities, ancient and modern, are uniform to the effect that if, by the irruption of the waters of a tidal river a new channel is formed in the land of a subject, although the rights of the Crown and of the public may come into existence and be exercised in what has thus become a portion of a tidal river.....the right to the soil remains in the owner, so that if at any time thereafter the waters shall recede, and the river again change its course leaving the new channel dry, the soil becomes again the exclusive property of the owner, free from all rights whatsoever in the Crown or in the public." It is, perhaps, unnecessary to add that although the specific reference in that case is to a tidal river, their Lordships consider the principle equally applicable to a non-tidal river.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed and the decree of the lower court is

(1) (1869) L. R., 4 Ex., 361, at p. 368.

1905

RITRAJ  
KUNWAR  
v.  
SARFARAZ  
KUNWAR.

Commissioner confirmed. The appellant must pay the costs of the appeal.

*Appeal dismissed.*

Solicitors for the appellant:—*Young, Jackson, Beard & King.*

Solicitors for the respondent:—*T. L. Wilson & Co.*

J. V. W.

1905  
May 2.

## APPELLATE CIVIL.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burdett.*

KANHAI LAL (PLAINTIFF) v. KALKA PRASAD AND OTHERS  
(DEFENDANTS).\*

*Pre-emption—Refusal to purchase—Insolvency—Civil Procedure Code, sections 351 and 352—Private sale by Collector in pursuance of orders of Civil Court exercising jurisdiction in insolvency.*

In order to debar a party entitled to pre-empt a sale from exercising his right an opportunity to purchase must be given when a definite agreement to purchase at a fixed price has been entered into with a stranger. It is not enough to offer property to a person entitled to pre-empt before an agreement to purchase has been entered into.

Where in pursuance of orders passed by the Civil Court in the exercise of insolvency jurisdiction certain revenue-paying property of the insolvent was sold by the Collector, but by private contract and not at public auction, it was held that such a sale did not oust the pre-emptive rights of such persons as were otherwise entitled to claim pre-emption. *Baij Nath v. Sital Singh* (1) referred to.

THIS was a suit for pre-emption of certain zamindari shares brought under the following circumstances. One Gopal Ram was the owner of zamindari shares in eleven villages. He became heavily indebted, and allowed payment of Government revenue to fall into arrears. In consequence of his default the Collector took his zamindari under direct management. Subsequently it was proposed that Kanhai Lal, a nephew of the defaulter Gopal Ram, should take a farming lease of his uncle's zamindari for fifteen years; and as Kanhai Lal was not a

Subor

appeal No. 120 of 1903, from a decree of Babu Nihala Chandra, Judge of Shahjahanpur, dated the 20th of April 1903.

(1) (1890) I. L. R., 13 All., 224

him according to law to take such a lease, Gopal Ram on the 17th of February 1900 sold to Kanhai Lal a 1 kachwansi share in the villages for Rs. 49. On the 19th of February of the same year Gopal Ram also sold to Kanhai Lal his share in two villages, namely, Bhatnausa and Barahna Buzurg, for the sum of Rs. 2,500, and this share was duly conveyed to the vendee. As to the proposed farming lease, the Board of Revenue refused to sanction it, and the arrangement consequently fell through. On the 30th of June 1900 Gopal Ram being unable to meet his liabilities applied to the District Judge of Shahjahanpur for a declaration of insolvency. His application was granted, and the Nazir of the District Judge's Court was appointed receiver of his property. On the 9th of January 1902 the Collector, acting on behalf of the receiver, sold and conveyed to one Kalka Prasad all the property of Gopal Ram, including the property comprised in the sale-deed executed in favour of Kanhai Lal on the 17th of February 1900, the consideration being Rs. 14,114. On the 9th of January 1903, Kanhai Lal sued to recover the property purchased by him on the 17th of February 1900 by virtue of his sale-deed and the remainder of the property conveyed by the deed of the 9th of January 1902, with the exception of a certain portion, as to which no right of pre-emption existed, by virtue of a right of pre-emption arising from the fact of his having acquired the status of a co-sharer in consequence of his purchase of a 1 kachwansi share in the several villages to which the abovementioned sale-deed of the 17th February 1900 related.

The Court of first instance (Subordinate Judge of Shahjahanpur) dismissed the plaintiff's suit on the grounds mainly that the sale of the 17th of February 1900 was a purely fictitious transaction, in respect of which no consideration ever passed, and that the plaintiff had, before the property the subject of the present suit was sold by the Collector to the principal defendant, refused to purchase the same. The plaintiff appealed to the High Court.

The Hon'ble Pandit *Sundar Lal* and *Prasanna Lal* *Nehru*, for the appellant.

1905

KANHAI  
LAL  
v.  
KALKA  
PRASAD.

1905

KANHAI  
LAL  
v.  
KALKA  
PRASAD.

Messrs. W. K. Porter, and M. L. Agarwala, and Munshi Gobind Prasad, for the respondents.

STANLEY, C.J., and BURKITT, J.—The facts of this case, so far as they are not in controversy, are as follows :—One of the defendants, Gopal Ram, was the owner of zamindari shares in eleven villages. He became heavily indebted, and allowed payment of the Government revenue to fall into arrears. In consequence of default in payment of the revenue the Collector caused his zamindari shares to be attached and took the same under his management. The plaintiff, Kanhai Lal, who is a nephew of Gopal Ram, was prepared to take a farming lease from the Collector of the property (of Gopal Ram) for a term of 15 years, and in order that he might become a co-sharer and so be eligible as a lessee under the provisions of section 157 of the Land Revenue Act, as amended, it was arranged that Gopal Ram should sell to him a one kachwansi share, that is a  $\frac{1}{400}$ th share in each of ten villages. This arrangement was carried out, and on the 17th of February 1900 a one kachwansi share in each of ten villages was conveyed by Gopal Ram to the plaintiff and the price thereof, Rs. 49, was paid. On the 19th of February 1900 Gopal Ram also sold to the plaintiff his share in two villages, namely, Bhatnasa and Barahna Buzurg, for a sum of Rs. 2,500, and this share was duly conveyed to the plaintiff. The Board of Revenue refused to sanction the lease proposed to be made by the Collector owing to the length of the proposed term, and this letting therefore fell through. On the 30th June 1900 Gopal Ram being unable to meet his liabilities applied for a declaration of insolvency to the District Judge of Shahjahanpur, and his application was granted on the 8th of August 1900, and the Nazir of the District Judge's Court was appointed receiver of his property. On the 9th of January 1902 the Collector acting on behalf of the receiver sold and conveyed to the defendant, Kalka Prasad, all the property of Gopal Ram, including the property comprised in the sale-deeds executed in favour of the plaintiff of the 17th and 19th of February respectively, the consideration being Rs. 14,114. This plaintiff claims a right to pre-empt under the terms of wajib-ul-arzes prepared at the settlement of the



1905

KANHAI  
LAL  
v.  
KALKA  
PRASAD.

villages in question, with the exception of shares in two villages, in respect of which no right of pre-emption is claimed.

The main defences set up were that the sale-deeds of the 17th and 19th of February 1900 were fictitious and were executed without consideration, and also that the plaintiff had refused to purchase the property.

The lower Court held that the sale of the 17th of February 1900 was fictitious, but that the sale of the 19th of February of the same year was a good sale. It also held that the plaintiff refused to purchase the property and so was debarred from claiming pre-emption, and further that the plaintiff ought to have claimed a right to pre-empt the entire property and not a portion only. The plaintiff's claim was accordingly dismissed.

In this appeal there are two questions of fact for determination. The first is whether or not the sale of the 17th of February 1900 was a good sale, and, secondly, whether or not the plaintiff refused to purchase. In the course of the hearing a question of law has been raised on the part of the respondents which must also be determined. Mr. *Porter* on their behalf contended that, admitting that the plaintiff was a co-sharer in the villages, the subject-matter of the suit, and had as such in the case of an ordinary sale a pre-emptive right, no such right existed in the case of a sale carried out by the Collector under the circumstances which we have stated; that the property was attached and under the management of the Collector and that the sale by him was on behalf of the receiver in the insolvency matter and was in fact a compulsory sale in execution of a decree carried out to satisfy the debts of the creditors of the insolvent. For this contention he relies upon, amongst others, the decision in the case of *Baij Nath v. Sital Singh* (1).

The sale of the 19th of February 1900 has been held to be a good sale, and this finding has not been impeached in appeal. Therefore as regards two villages, shares in which were conveyed to the plaintiff upon that sale, in the ordinary course the plaintiff would have a right to pre-empt the sale.

It is not disputed that if the plaintiff was a co-sharer in the villages which are the subject-matter of the suit, at the time

1905

KANHAI  
LAL  
v.  
KALKA  
PRASAD.

when the sale to the defendant Kalka Prasad was carried out, he had a pre-emptive right under the *wajib-ul-arzes* of the villages. The first question for our determination is whether the Court below was right in holding that the sale of the 17th of February 1900 was fictitious. It based its conclusions upon the evidence of the Tahsildar, to which it refers and also upon the evidence of the plaintiff himself. This sale was carried out in order to place Kanhai Lal in a position to obtain a lease from the Collector. So long as he was not a co-sharer in the property a lease could not be made to him, the Collector being only empowered to give a lease to a co-sharer. It is also the case that the transfer made to the plaintiff was of a very small share, namely, one kachwansi of each village, and that the price was proportionately small. From the mere fact, however, that the sale was of very small shares in the villages, we fail to see that it can be regarded as fictitious. The Collector was prepared to act upon it as a genuine sale, and in view of it to give to the plaintiff a lease of the villages for a term of 15 years. The plaintiff, moreover, was prepared to pay the arrears of revenue upon the execution of the lease. The learned Subordinate Judge, commenting on the evidence of the plaintiff, observes that that evidence shows "that the transfer was made simply to make him ostensible shareholder in all the villages." As to this comment the obvious reply is that it was not to make him an ostensible shareholder, but a real shareholder, that the transfer was made. This both the Tahsildar and the plaintiff deposed to. The Tahsildar says :—"There being no co-sharer in the property who could take the property in farm, a sale-deed in respect of a kachwansi share in each of the villages was executed in favour of Kanhai Lal, the nephew of Gopal Ram, for Rs. 49 in order to make him a co-sharer." We find also that under an agreement, dated the 19th of February 1900, Baldeo Prasad, the father of Kanhai Lal, undertook to become surety for the payment of the Government revenue provided the *mustajir* (i.e., the farming lease) was sanctioned. Kanhai Lal, by the sale-deed in respect of the one kachwansi share of the villages was executed to make him a co-sharer in order that he might take the property on lease. The

evidence shows that the consideration was duly paid, and, except ] for the fact that mutation of names was not effected in respect of the shares comprised in the sale-deed, there is no evidence to support the contention that the sale was fictitious. It seems to us that, though the sale was a sale of very small shares in the property, it was a genuine sale, entered into no doubt for the purposes of giving the plaintiff the status of a co-sharer and so qualifying him under section 157 of the Revenue Act to take the farming lease. This was, however, in no way an illegal object.

We now come to the question of the alleged refusal of the plaintiff to purchase. The learned Subordinate Judge came to the conclusion that the plaintiff did refuse to purchase the property, and he refers to his judgment in suit No. 1 of 1903 for the reasons which induced him to come to this decision. In his judgment in that suit he says :—"The evidence of the Tahsildar, whom I have got no reason to disbelieve, shows that the plaintiff refused to purchase the shares in dispute." And later on :—"The plaintiff ought to have said that he was willing to purchase only the shares in dispute if he had really any mind to do so. It appears from the evidence of the Tahsildar that he had on no account any intention of purchasing the property of Gopal Ram." Turning to the evidence of the Tahsildar referred to, namely, Mirza Ahmad Jan, we find that no opportunity was given to the plaintiff to purchase the property when the sale to Kalka Prasad took place, namely, the 9th of January 1902 or thereafter. The Tahsildar referred to a conversation which he had with the plaintiff and with Baldeo Prasad and Gopal Ram in the month of August 1901, four or five months before the sale to Kalka Prasad was completed. His evidence is as follows :—"I know the parties to the suit, namely, Baldeo Prasad and Kalka Prasad, Gopal Ram and Kanhai Lal. Once these four persons came to me and Kalka Prasad said that he was going to purchase the entire property of Gopal Ram, and that if Baldeo Prasad and Kanhai Lal wanted to take it they could do so. Thereupon I asked Baldeo Prasad and Kanhai Lal, properly they said that neither they had money, nor could they do so with Gopal Ram, and so they did not want to make the purchase.

1905

KANHAI  
LAL  
v.  
KALKA  
PRASAD.

1905

KANHAI  
LAL  
v.  
KALKA  
PRASAD.

Kalka Prasad said that for that property he would pay Rs. 14,000 in cash and Rs. 5,000 on account of a debt due to a person. He mentioned the name of that person, but I do not recollect it." This is the evidence upon which the Court below relied in holding that the plaintiff had refused to purchase and was therefore debarred from exercising his right of pre-emption. This evidence only shows that the plaintiff expressed his unwillingness to purchase the property in August 1901, that is, four or five months before the sale to Kalka Prasad. As we pointed out in our judgment in the case of *Sohan Lal v. Shahab-ud-din Khan* (Second Appeal No. 909 of 1901, unreported), in order to debar a party entitled to pre-empt a sale from exercising his right an opportunity to purchase must be given when a definite agreement to purchase at a fixed price has been entered into with a stranger. It is not enough to offer property to a person entitled to pre-empt before an agreement to purchase has been entered into with a third party, as was the case here. We have not been referred to any other evidence in support of the finding of the Court below that the plaintiff did refuse to purchase on this occasion, and the decision on this issue therefore cannot be supported. This disposes of all the questions raised in the grounds of appeal.

An ingenious point, however, to which we have already alluded, has been made by Mr. Porter, which was not raised in the Court below. It is that the sale to Kalka Prasad was in reality a compulsory sale carried out to satisfy the debts of the creditors of Gopal Ram, and that in the case of a compulsory sale no pre-emptive right can be exercised. His contention is based upon the insolvency sections of the Code of Civil Procedure, and particularly upon sections 351 and 352. Section 352 provides that a declaration of insolvency pronounced under section 351 "shall be deemed to be a decree in favour of" each of the creditors for their respective debts. The argument is that a sale held by a receiver appointed under the insolvency sections carries with it the same consequences as a sale by the Court of a decree, and that as in the case of such last mentioned sale no pre-emptive claim can be advanced, so likewise upon a sale by the receiver of an insolvent estate all

rights of pre-emption are extinguished. We have not been referred to any authority which directly supports this proposition, and are not prepared to accede to the contention.

An order appointing a receiver operates to vest in the receiver all the insolvent's property with the exceptions specified in the first proviso to section 266, and it is the duty of the receiver under the directions of the Court to convert that property into money, that is, to do that which the insolvent proprietor might have done before he was declared to be insolvent. In the present case the receiver has sold the property in dispute by private sale. There is nothing in the Code which suggests that any such sale can be effected in derogation of or to the prejudice of the rights of third parties. In the case of compulsory sales, such as those which take place by public auction in execution of decrees, the Legislature has not been regardless of the right of pre-emption. Such compulsory sales take place after the issue of a public proclamation, which it is not unreasonable to assume becomes known to all persons having pre-emptive rights. Section 310 of the Code moreover to some extent protects the rights of co-sharers in providing that when the property sold in execution of a decree is a share in undivided immovable property and two or more persons, of whom one is

co-sharer, respectively advance the same sum at any bidding, such bidding shall be deemed to be the bidding of the co-sharer. As Mahmood, J., observed:—"Under the rules of procedure compulsory sales take place after a public proclamation, which, being an act of the Court or revenue authority, is taken to be sufficient notice to the pre-emptors, along with the public at large, to come forward and purchase the property, and it seems reasonable to suppose that those who do not appear to bid at the auction sale have no wish to purchase the property. These considerations seem sufficient to render the ordinary law of pre-emption inapplicable to sales by public auction in execution of decrees, and this view has received judicial sanction." (*Bairj Nath v. Sital Singh* (1). In the case before us the sale was privately arranged between the Collector and the property owner and was not by public auction, and, as we have already pointed

1905

KANHAI

LAL

v.

KALKA

PRASAD

1905

KANTHAI  
LAL  
v.  
KALKA  
PRASAD.

out, no opportunity was given to the plaintiff to purchase at the price agreed to be given by Kalka Prasad. We therefore are unable to hold that the plaintiff has lost his pre-emptive right. We are unable to see that the fact that the property was under attachment for arrears of revenue in any way affected the plaintiff's rights in the matter of pre-emption. The decree of the Court below dismissing the plaintiff's claim cannot therefore be upheld. We must allow the appeal, set aside the decree of the Court below, and, as the appellant through his learned advocate has stated that he is willing to take a decree for pre-emption of the ten villages in dispute on payment of the full price of Rs. 14,114 excluding from the decree the lands No. 4 and No. 7 in the schedule to the plaint, we give a decree for pre-emption accordingly with costs of this appeal, including fees on the higher scale, and also costs in the Court below, conditional on payment on or before the 1st of August next of the sum of Rs. 14,114. In default of payment of the said sum the plaintiff's suit will be dismissed with costs in both Courts.

*Appeal decreed.*

1905  
May 2.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice  
Sir William Burdett.*

NAWAB BEGAM AND OTHERS (PLAINTIFFS) v. A. H. CREET  
(DEFENDANT).\*

*Act No. I of 1877 (Specific Relief Act), section 22—Specific performance of contract—Discretion of Court—Delay in applying to the Court for relief.*

Great delay on the part of the plaintiff in applying to the Court for specific performance of a contract of which he claims the benefit is of itself a sufficient reason for the Court in the exercise of its discretion to refuse relief. *Milward v. The Earl of Thanet* (1) referred to.

This was a suit to enforce specific performance of an agreement to sell certain property (a piece of land situate in Cawnpore) to the plaintiffs entered into on the 11th of May 1898. Shortly after the agreement was entered into differences arose between the parties as to the terms of the contract, and on the

*Ms. No. 56 of 1903, from a decree of Babu Bipin Behari Mukerji, J., Judge of Cawnpore, dated the 20th of November 1902.*

(1) (1891) 5 Ves. 720n.

14th of June 1898 the defendant definitely declined to complete the contract. He, however, expressed his willingness to meet the plaintiffs fairly and to enter into negotiations for a new contract if such were agreeable to them. After this certain correspondence ensued between the parties, or their legal advisers, the last letter on the subject of this agreement being one written by the defendant's pleader to the plaintiffs' pleader on the 30th of August 1899. The plaintiffs apparently took no further interest in the matter until they instituted the present suit, which was filed on the 10th of June 1901, that is to say, nearly three years from the time when they first had notice that the defendant refused to carry out his agreement.

The Court of first instance (Subordinate Judge of Cawnpore) dismissed the plaintiffs' suit, mainly on the ground of the great delay on their part in coming into Court to seek to enforce the agreement. The plaintiffs thereupon appealed to the High Court.

The Hon'ble Pandit *Sundar Lal* and Maulvi *Ghulam Muftaba*, for the appellants.

Mr. *B. E. O'Connor* and Pandit *Moti Lal Nehru*, for the respondent.

STANLEY, C. J., and BURKITT, J.—On the ground of delay and laches alone on the part of the plaintiffs we think the Court below rightly dismissed the plaintiff's suit. It is well established that the delay of either party to a contract in not prosecuting his right to the interference of the Court by the institution of a suit may constitute such laches as will disentitle him to the aid of the Court. For the purpose of specific performance undue delay may amount to an abandonment of the contract by an aggrieved party. "A party cannot call upon a Court of equity for specific performance," said Lord Alvanley, M. R., "unless he has shown himself ready, desirous, prompt and eager." *Milward v. Earl of Thanet* (1). The rule is specially applicable when the subject-matter of the contract is of a speculative or fluctuating value. It is said on behalf of the respondent, and it is not denied, that property in Cawnpore has of late years largely increased in value, and the

1905

NAWAB  
BEGAMv.  
A. H. CREET.

(1) (1801) 5 Ves. 720n.



1905

NAWAB  
BEGAM

v.

A. H. CREET.

suggestion has been thrown out that it is to the enhancement of the value of the property which is the subject-matter of this appeal rather than to any sentimental wish, such as is suggested on the part of the appellants, to regain possession of their ancestors' property that this litigation owes its origin. The plaintiffs, it is said, encouraged by aid from outside speculators, hoped by the aid of the Court to carry out a bargain which for the reason stated above would be highly beneficial to them. That there has been great delay on the part of the plaintiffs in seeking the aid of the Court is established beyond any doubt. The agreement sought to be enforced is dated the 11th of May 1893. Differences arose between the parties in regard to the terms of the contract, and so long back as the 14th of June 1898 the plaintiffs were apprised by the defendant that the contract was at an end. The defendant, however, expressed his willingness to meet the plaintiffs fairly and to enter into negotiations for a new contract, if such were agreeable to them. So on the 14th of June 1898 the plaintiffs had notice that the defendant refused to perform the contract. Nothing was done until the suit out of which this appeal has arisen was instituted on the 10th of June 1901, that is, after a lapse of nearly three years. The last letter on the subject of the agreement was written on the 30th of August 1899, by the defendant's pleader to the plaintiffs' pleader. This terminated the correspondence. On the part of the plaintiffs it has been contended that the delay in completing the contract was solely attributable to the fact that the defendant insisted that certain mortgagee rights which he possessed were not included in or affected by the contract. But if this were so it was the duty of the plaintiffs to insist on, and if necessary promptly institute a suit for specific performance. Not having done so it appears to us that their suit was rightly dismissed.

The defendant has sworn, and we think truly, that he has spent a considerable sum of money in improving the property since October 1899 and that the rents have gone up considerably since that time, and it appears to us that it would be inequitable to give the plaintiffs the benefit of this expenditure and of the

enhancement in value of the property. It further appears that notice has been served under the Land Acquisition Act for the acquisition of portion of the property for the purposes of extension works in connection with the Railway, and that in respect of this land the defendant has filed in the Collector's Court a claim for compensation amounting to upwards of two lakhs. We think it highly probable that it was in view of these matters that the tardy claim of the plaintiffs for specific performance was advanced.

The Court below has also held that inasmuch as the contract contained an agreement empowering the defendant to sell the property, the subject-matter of the suit in default of payment of certain instalments of the purchase money which was invalid in view of the provisions of section 69 of the Transfer of Property Act, the contract ought not to be specifically enforced. This raises a question of some nicety. It is admitted that this provision of the contract is invalid, but it is said on behalf of the plaintiffs appellants that the mistake of the parties in inserting it was a mistake of law and not of fact and that the Court ought not to relieve the defendant from his obligation to fulfil his contract, by reason of such a mistake. And especially so as plaintiffs are willing to take specific performance expunging the sale clause, *i.e.*, expunging that without which the defendant swore he would not have entered into the contract. Now it is true that a Court of equity will not in general relieve against a mistake in a contract which was a mistake of law, but there are cases in which the Court does not hold itself strictly bound by this rule but relieves against a mistake of law if there be any equitable ground which makes it under the particular facts of the case inequitable that a party benefited by the mistake should retain that benefit. "If the defendant," said Plumer, V.C., "can show any circumstances *dehors*, independent of the writing, making it inequitable to interpose for the purpose of a specific performance, a Court of equity having satisfactory information upon that subject will not interpose." *Reeves v. Higginson*, (1). Referring to the general rule, Mellish, L. J.,

1905

NAWAB  
BEGAMv.  
A. H. CREET.

(1) (1813) 1. V. and B., 524; at p. 527; 12 R. R., 235.

1905

NAWAB  
BEGAM

A. H. CREET.

observed in *Rogers v. Ingham* (1):—"I think there is no doubt that the rule at law is in itself an equitable and just rule which is not interfered with by Courts of equity; but, on the other hand, I think that, no doubt, as was said by Lord Justice Turner, "This Court has power (as I feel no doubt that it has) to relieve against mistakes in law as well as against mistakes in fact [*Stone v. Godfrey*, (2)] that is to say, if there is any equitable ground which makes it under the particular facts of the case inequitable that the party who received the money should retain it." The learned Subordinate Judge in the exercise of his discretion considered that it would be improper to enforce specific performance of a contract containing a provision contrary to law. We are not prepared to say that in this case he was wrong in refusing to do so. A Court of equity may look to circumstances outside the contract and not accept the validity of the contract of itself as conclusive in plaintiff's favour. In this case the evidence shows that the defendant would not have entered into the contract if he had been aware that the provision for sale contained in it in default of payment of instalments of the purchase money was invalid. He assigns good reasons for the insertion of this provision in the contract. Both parties were at the time of the contract clearly in ignorance or had lost sight of section 69 of the Transfer of Property Act, and that effect could not be given to the power to sell for which the defendant contracted. Seeing that this material term of the contract cannot be enforced, would it be equitable to enforce the contract in dispute? The Court below in the exercise of its discretion, which cannot be said to have been capriciously exercised, decided this question in the negative. We should not be disposed to disagree in the view it took if it were necessary to decide the question, but in view of the great delay on the part of the plaintiffs in seeking the aid of the Court, with which we have already dealt, it is unnecessary to determine it.

Pandit *S. C. Lal* relied upon the provisions of section 28 of the Specific Relief Act, which preclude the enforcement of a contract, <sup>36</sup> <sup>nd</sup> to which was given under the influence of a mistake of fact, misapprehension or surprise. He argued from

(1) (1876) L. R., 3 Ch. D., 351; at p. 357.

(2) (1854) 5 DeCt. M. and G., 76.

1905

NAWAB  
BEGAMv.  
A. H. CREET.

the fact that a mistake in law was not mentioned in this section, that the Court was not merely not precluded from enforcing, but ought to enforce a contract induced by a mistake of law. We cannot accede to this argument. The fact that the enforcement of certain contracts is prohibited by the section does not narrow the power of the Court in other cases or prevent it from refusing in the exercise of a proper discretion to enforce specific performance on equitable grounds. We think that the plaintiffs have by their delay and laches lost their right to the aid which the Court might have given them if they had promptly appealed to it.

As regards the claim for damages, no attempt whatever has been made to prove any damage. This is admitted by the learned advocate for the appellants. Consequently the last ground of appeal must fail.

We therefore dismiss the appeal with costs including fees on the higher scale.

We have also to consider an objection filed under section 561 of the Civil Procedure Code on the subject of costs. The Court below for reasons assigned in the judgment directed that the parties should bear their own costs. The respondent claims to be entitled to his costs in the Court below. Under the circumstances we see no reason for interference with the decision of the Court below upon this question and we disallow the objection.

We say nothing as to costs.

*Appeal dismissed.*

1905

May 4.

## FULL BENCH.

*Before Mr. Justice Knoor, Mr. Justice Sir William Burdett and  
Mr. Justice Aikman.*

BASDEO PRASAD AND OTHERS (DECREE-HOLDERS) v. JUTHAN RAM  
(JUDGMENT-DEBTOR).\*

*Execution of decree—Question of saleability of property in execution—Property described in decree as a permanent tenure—Estoppel—Civil Procedure Code, section 287—Duty of Court executing decree.*

In execution of a decree on a compromise for payment of a certain sum of money and in default thereof for the sale of certain properties therein specified, application was made to sell certain fields described in the decree as held by the judgment-debtor on a permanent tenure. The judgment-debtor objected that the properties were not saleable, being held by occupancy tenure. *Held* that this objection was not open to the judgment-debtor, inasmuch as it was one which he might have raised in the suit in which the decree was passed, but did not. But the statement as to tenure contained in the decree was not binding on third persons.

*Per BURKITT, J.*—It would be the duty of the Court executing the decree, should it have reason to believe that the property the sale of which was asked for was held by occupancy tenure, to notify that fact in the proclamation of sale as a warning to prospective bidders.

*Ram Janam Ram v. Rameshar Rai* (1) followed.

THIS was an application to execute a decree passed upon a compromise by sale of certain property. The decree provided for the payment to the decree-holders of a certain sum of money, and in default of payment in manner therein set forth for the sale of certain property. Amongst this property were some fields described in the decree as held by the judgment-debtor on a permanent tenure (*istimrari patta*), which would therefore be susceptible of sale in execution. When, however, the decree-holders sought to bring these fields to sale, they were met by the judgment-debtor with an objection to the effect that these fields were held by him on an occupancy tenure, and therefore could not be sold in execution of the decree. The Court of first instance (Subordinate Judge of Ghazipur) allowed the judgment-debtor's objection in this respect and dismissed the application for execution, and this order was upheld in appeal by the

\* Second Appeal No. 1023 of 1903, from a decree of L. Marshall, Esq., Officiating Judge of Ghazipur, dated the 27th of June 1903, confirming a decree of Syed Tajummul Husain, Subordinate Judge of Ghazipur, dated the 18th of April 1903.

1905

BASDEO  
PRASAD  
v.  
JUTHAN  
RAM.

District Judge of Ghazipur. The decree-holders thereupon appealed to the High Court, raising two pleas, first, that the executing Court could not go behind the decree, but was bound to execute it as it stood, and, secondly, that the question whether the property sought to be sold was saleable ought to have been raised in the original suit.

Babu Jogindro Nath Chaudhri, who appeared with Munshi Gobind Prasad for the appellants, contended that, the decree having directed the sale of the holding the sale of which was asked for, the question whether the property was or was not saleable, could not be taken cognizance of by the Court executing the decree. The executing Court must obey the orders of the Court which passed the decree. *Madho Lal v. Katwari* (1) and *Bisheshar v. Sukhdeo Rai* (2) were referred to. The purchaser would take the rights of the judgment-debtor who would be precluded from contesting the validity of the sale. Whether he would be entitled to eject the tenant was not a question raised in this appeal. The question now was whether the judgment-debtor could resist the sale. The executing Court might be under the duty of giving certain information to intending purchasers; but that was all. It could not entertain the question of the legality or otherwise of the decree. *The Maharaja of Bhartpur v. Rani Kannos Dei* (3), *Tota Ram v. Dwarka Prasad* (4) and *Ramjanam Ram v. Rameshar Rai* (5) were also referred to. The judgment-debtor was not competent to deny that the property ordered to be sold was an *istimrari* holding.

Mr. Abdul Majid for the respondent. When the question is as to the competency or jurisdiction of the Court to pass a decree, the court executing the decree could go behind the decree and see if the decree could be passed. *Muhammad Subaiman v. Fatima* (6) and *Imdad Ali v. Jagan Lal* (7) were relied on. The question was whether the law for the sale of an occupancy holding. The finding is that if it was an occupancy holding, the Court could

(1) (1887) I. L. R., 10 All., 130.

(2) Weekly Notes, 1888, p. 41.

(3) (1901) I. L. R., 28 All., 181.

(7) (1895) I. L. R., 17 All., 478.

(4) Weekly Notes, 1888, p. 69.

(5) Weekly Notes, 1892, p. 5.

(6) (1889) I. L. R., 11 All., 314.

1905

BASDEO  
PRASAD  
v.  
JUTHAN  
RAM.

KNOX, BURKITT and AIKMAN, JJ.—The decree-holders, who are appellants here, obtained a decree upon a compromise for payment of a certain sum of money and in default for the sale of certain properties. Amongst the properties specified as liable to sale under the decree were a number of fields described as held by the judgment-debtor on a permanent tenure (*istim-rari patta*). Default having been made, the appellants applied for execution of the decree by sale of the property mentioned therein. The defendant raised certain objections in the execution Court. One of these objections was that certain lands, the sale of which was asked for, were occupancy holdings and that the prayer for the sale of these lands was illegal. The validity of the objections was not admitted by the decree-holders. The executing Court sustained the above objection and disallowed the decree-holder's application for the sale of the land. This decision was affirmed by the lower appellate Court. The decree-holders come here in second appeal.

One of the pleas raised is that the question whether the property sought to be sold is saleable should have been raised in the original suit.

In our opinion this plea is valid and must be sustained.

On the face of the decree there is nothing illegal. That which is ordered to be sold is the interest of a permanent tenure holder. By law this is a heritable and transferable interest, and therefore liable to attachment and sale under a decree. The decision in *Ram Janam Ram v. Rameshar Rai* (1) is entirely in favour of the appellants. The learned judges who decided that case said in their judgment:—"We are of opinion that the principle which is embodied in section 13 of the Code of Civil Procedure applies to this case and that the judgment-debtor having had in the suit an opportunity of putting forward a defence that the sale of the holding was prohibited by law and having failed to raise that question in the suit, the Court executed cannot now entertain this objection."

With that opinion we entirely agree.

Our decision in this appeal, it need scarcely be said, concerns only the parties to the appeal, and does not prejudice any



right of third parties. For instance, it is not binding on the land-holder.

We allow the appeal, with costs. Setting aside the orders of the Courts below, we dismiss the objection so far as it relates to the lands in dispute, and direct the Subordinate Judge of Ghazipur to proceed with the execution according to law. The appellants will have their costs in the lower appellate Court and their proportionate costs in the Court of first instance.

BURKITT, J.—In addition to the judgment which has just been delivered in the name of the Bench, I desire to point out to the Court executing the decree that when under section 287 of the Code of Civil Procedure it sets about preparing a proclamation of sale, it is its duty under the last clause of that section to ascertain as far as possible, *inter alia*, “every other thing which the Court considers material for the purchaser to know in order to judge of the nature and value of the property.” If then the execution Court should have reason to believe that the property which it has been ordered to sell is an occupancy holding, it should enter that fact in clause (e) of the proclamation as a warning to an intending purchaser that he may take nothing by his purchase.

I have no doubt that if that which is sold is an occupancy holding, the purchaser of it acquires by his purchase no interest in that holding; the purchase is not binding on the land-holder, and the occupancy tenant whose interest has been sold cannot, by reason of section 56 of the Rent Act be ejected otherwise than in accordance with the provisions of the Local Tenancy Act No. II of 1901.

*Appeal decreed.*

1905

BASDEO  
PRASAD  
v.  
JUTHAN  
RAM.

1905  
May 6.

*Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Banerji and  
Mr. Justice Sir William Burkitt.*

RAM BAHADUR PAL AND OTHERS (PLAINTIFFS) v. RAM SHANKAR  
PRASAD PAL (DEFENDANT).\*

*Specific relief—Mandatory injunction—Discretion of Court—Injunction  
refused upon unsubstantial grounds—Civil Procedure Code, section 584.*

In a suit by co-sharers for demolition of a building as having been recently erected without their consent on common land by another co-sharer the Court found that the building had been erected as alleged by the plaintiffs, but refused to grant them a mandatory injunction upon the ground that "the area was reclaimed by the appellant, defendant, and that others (the plaintiffs included) who have done the same have been allowed to build on the areas thus reclaimed without any objection, and that no special damage was done." *Held* that this was not a valid reason for refusing to grant a mandatory injunction; and that such refusal was under the circumstances a good ground of appeal within the meaning of section 584 of the Code of Civil Procedure.

In this case both the parties were co-sharers in mauza Hari-harpur. In the village site and close to the houses of the parties there was an old ditch which had gradually been filled up to nearly its whole extent. This was done by the co-sharers, and the plaintiffs themselves utilized part of the ground so reclaimed to extend their own house. The defendant acted in like manner, but used the reclamation to plant bamboos. Shortly before the filing of the suit the defendant cut down the bamboos and began to extend his house over a portion of the area formerly occupied by the ditch. The plaintiffs thereupon instituted the present suit, in which they sought to have that portion of the defendant's house which encroached upon the common land demolished. The Court of first instance (Officiating Munsif of Basti) gave the plaintiffs a decree for demolition of a portion of the defendant's house. The defendant appealed. The lower appellate Court (District Judge of Gorakhpur), whilst agreeing with the first Court as to the facts, considered that the plaintiffs ought not to get a mandatory injunction. The learned District Judge observed:—"The lower Court's view of the matter is correct, but considering that the area was reclaimed by the appellant and that others, the plaintiffs included, who have done the same have been

\* Second Appeal No. 209 of 1903, from a decree of W. Tudball, Esq., District Judge of Gorakhpur, dated the 15th of December 1902, reversing a decree of Babu Lal Gopal Mukerji, Officiating Munsif of Basti, dated the 27th of September 1902.

allowed to build on the areas thus reclaimed without any objection and that no special damage has accrued to anyone, I do not think that the case calls for the issue of any injunction." The Court accordingly allowed the appeal, reversed the decision of the Munsif and dismissed the plaintiffs' suit. The plaintiffs appealed to the High Court.

Babu *Durga Charan Banerji*, for the appellants, submitted that one of the joint owners was not entitled to build upon the joint land without the consent of the others. He relied on *Najju Khan v. Imtiaz-ud-din* (1) and *Muhammad Ali Jan v. Faiz Bakhsh* (2).

Munshi *Gobind Prasad*, for the respondent, argued that, in the first place the granting or refusing of a mandatory injunction being a matter for the discretion of the Court and the lower appellate Court having exercised its discretion, there was no ground for second appeal within the meaning of section 584 of the Code of Civil Procedure, and, in the second place, even if there was, the High Court ought not to interfere with the discretion of the lower appellate Court. He referred to *Hamid Ali v. Gaya Din* (3), *Ganesh Singh v. Kaushal Singh* (4), *Kaushal Singh v. Ganesh Singh* (5), *Shadi v. Anup Singh* (6) and *Paras Ram v. Sherjit* (7).

STANLEY, C. J., and BANERJI and BURKITT, JJ.—This appeal was referred to a Bench of three Judges on the representation that questions arose in it which were the subject of conflicting decisions of the Court.

We do not find that the decisions are conflicting. We desire in the first place to say that any observations which we make in this judgment are directed to the particular circumstances of this case. Every case of this nature must be decided in view of the facts which are established in evidence. It appears in this case that the defendant respondent and the plaintiffs appellants are co-sharers in a certain village and proceeded to erect a wall upon a portion and. Immediately on his commencing the building proceedings

1905

RAM  
BAHADUR  
PAL  
v.  
RAM  
SHANKAR  
PRASAD  
PAL.

(1) (1895) I. L. R., 18 All., 115.

(2) (1896) I. L. R., 18 All., 361.

(3) (1904) I. L. R., 26 All., 327.

(4) Weekly Notes, 1900, 55.

(5) Weekly Notes, 1901, 53.

(6) (1889) I. L. R., 12 All., 436.

(7) (1887) I. L. R., 9 All., 661.

1905

RAM  
BAHADUR  
PAL  
v.  
RAM  
SHANKAR  
PRASAD  
PAL.

were taken by the plaintiffs in the Criminal Court to prevent the continuance of the erection, but inasmuch as it was found that the defendant was in possession of the land upon which the wall was being constructed, the Criminal Court could give no redress, and consequently it became necessary for the plaintiffs to seek the aid of the Civil Court. Accordingly the suit out of which this appeal has arisen was instituted. Now it has been established by the evidence that the land in question is common land. It has also been found, and it is clear from the evidence, that so soon as the defendant began to construct the wall the plaintiffs objected and took the proceedings to which we have referred. They therefore in no way acquiesced in the building of the wall. Under these circumstances it seems to us that the right of the plaintiffs to maintain the suit was clear, and so the Court of first instance decided. On appeal, however, the learned District Judge, though upholding the view of the law propounded by the Court of first instance, came to the conclusion that the case was not one in which the Court in the exercise of its discretion should grant a mandatory injunction, for reasons which appear to us to be wholly erroneous. He says in the course of his judgment:—"The lower Court's view of the law no doubt is correct, but considering that the area was reclaimed by the appellant (*i.e.*, the defendant) and that others (the plaintiffs included) who have done the same have been allowed to build on the areas thus reclaimed without any objection, and that no special damage has accrued to any one, I do not think that the case calls for the issue of any injunction." Now, the lower appellate Court admits that the view of the law propounded by the Court of first instance was correct, but comes to the conclusion that the Court ought not to grant a mandatory injunction because the plaintiffs themselves had done a similar unlawful act to that for which redress, that is in other words that a wrong previously committed by the plaintiffs redress ought to be given to them in respect of a wrong done to them by the defendant. This is not the law. Then the learned District Judge says that no special damage has been proved. It is not necessary in a case of this kind to prove special damage.

The fact that the wall has been constructed upon common land is of itself sufficient to call for the interference of the Court.

Now two objections have been raised to the hearing of this second appeal. The first is that no second appeal lies under the provisions of section 584 of the Code of Civil Procedure, and the second that this Court ought not to interfere where a discretion has been exercised by a Court such as was exercised by the lower appellate Court in this case. The answer to the first objection is that the case comes within section 584 because the decision of the lower appellate Court was a decision contrary to law as specified in the memorandum of appeal. The lower appellate Court admitted that the view of the law entertained by the Court of first instance was correct, but refused to apply the law to the case. This is an answer to the first objection to the hearing of the appeal. As regards the second objection, it can be equally readily disposed of. The Court below did not exercise a judicial discretion in refusing a mandatory injunction. It exercised an arbitrary discretion, not such a discretion as can be termed a judicial discretion. For these reasons we allow the appeal, set aside the decree of the lower appellate Court, and restore the decree of the Court of first instance with costs in all Courts.

*Appeal decreed.*

1905

RAM  
BAHADUR  
PAL  
v.  
RAM  
SHANKAR  
PRASAD  
PAL.

## • APPELLATE CIVIL. • • •

1905  
May 10.

*Before Mr. Justice Banerji and Mr. Justice Richards.*

MATA DIN AND OTHERS (DEFENDANTS) v. JAMNA DAS AND ANOTHER  
(PLAINTIFFS).\*

*Civil Procedure Code, section 562—Remand—Preliminary point—Suit decided with reference to some only of several issues framed.*

*Held* that it is competent to an appellate Court to remand a case under section 562 of the Code of Civil Procedure where the Court of first instance, having framed issues and recorded all the evidence, has done so with reference to its finding upon one or more of the issues, and left other issues undecided. *Sheoambar Singh v. Lallu S\**  
*Joshi v. Hazi Kassim* (2)\* followed.

\* First Appeal No. 112 of 1904 from an order of J. Mata Prasad, District Judge of Cawnpore, dated the 24th of August 1904.

(1) (1886) I. L. R., 9 All., 30,      (2) (1892) I. L. R., 16 Mad., 207.  
foot-note.

1905

MAṬA DIN  
v.  
JAMNA DAS.

THE plaintiffs in this case brought their suit for recovery of a certain sum of money on the basis of an award of arbitrators. In the alternative they claimed the same amount as due to them on the basis of an alleged compromise which had taken place during the pendency of the proceedings before the arbitrators. There were three defendants, of whom Nos. 2 and 3 were no parties to the arbitration proceedings. The Court of first instance (Subordinate Judge of Cawnpore) framed four issues, the first of which was as follows:—"Whether the arbitrators made and pronounced the award sued upon; and whether it can be enforced against the defendants Nos. 2 and 3." The Court tried the first portion of this issue, and came to the conclusion that the award was invalid and could not be enforced against any one of the defendants. It then proceeded to consider the question of the compromise, and held that the claim as based on it was barred by limitation, the Court being of opinion that a note of hand, which, it was alleged, saved the operation of limitation, as it contained an acknowledgment of liability, was not genuine. Upon appeal the lower appellate Court (District Judge of Cawnpore) differing from the Court of first instance, held that the award was a valid document and could be enforced. It was also of opinion that the note of hand on which the plaintiffs relied was a genuine document. As the Court of first instance had not tried a portion of the first issue and also the second and third issues which related to the other questions arising in the suit, it remanded the case under section 562. In the view which the Court of first instance took of the first issue it was unnecessary for it to try the other issues to which we have referred. Against this order of remand the defendants appealed to the High Court.

Mr. W. K. Porter, for the appellants.

Mr. J. N. Sanyal, for the respondents.

RICHARDS, JJ.—This is an appeal from an order made under section 562 of the Code of Civil Procedure. The plaintiffs respondents brought their suit for recovery of a certain sum of money on the basis of an award of arbitrators. In the alternative they claimed the same amount as due to them on the basis of an alleged compromise which had

1905

MATA DIN  
v.  
JAMNA DAS.

taken place during the pendency of the proceedings before the arbitrators. There were three defendants, of whom Nos. 2 and 3 were no parties to the arbitration proceedings. The Court of first instance framed four issues, the first of which was as follows:—"Whether the arbitrators, made and pronounced the award sued upon; and whether it can be enforced against the defendants Nos. 2 and 3." The Court tried the first portion of the issue, and came to the conclusion that the award was invalid and could not be enforced against any one of the defendants. It then proceeded to consider the question of the compromise, and held that the claim as based on it was barred by limitation, the Court being of opinion that a note of hand, which, it was alleged, saved the operation of limitation, as it contained an acknowledgment of liability, was not genuine. Upon appeal the lower appellate Court, differing from the Court of first instance, held that the award was a valid document and could be enforced. It was also of opinion that the note of hand on which the plaintiffs relied was a genuine document. As the Court of first instance had not tried a portion of the first issue and also the second and third issues, which related to the other questions arising in the suit, it remanded the case under section 562. In the view which the Court of first instance took of the first issue it was unnecessary for it to try the other issues to which we have referred.

It is contended on behalf of the appellants, the defendants to the suit, that the suit had not been decided by the Court of first instance upon a preliminary point, and that consequently the lower appellate Court acted beyond its jurisdiction in remanding the case to that Court under the provisions of section 562. This leads us to the question what is meant by the words "a preliminary point," in section 562 of the Code of Civil Procedure. The question is one not free from difficulty. If it had been decided upon the provisions of section 562 as it stood before its amendment by Act No. 18 of 1880, there might have been considerable force in the argument of the learned counsel for the appellants; but since the amendment of the section, and the omission from it of the words "so as to exclude any evidence of fact which appears to the appellate



1905

MATA DIN

v.

JAMNA DAS.

Court essential to the determination of the rights of the parties" we must take the Legislature to have intended that a wider meaning should be attached to the words than they would ordinarily bear. The section has been considered by this Court, and other High Courts. In *Shcoambar Singh v. Lala Singh* (1) Mr. Justice Mahmood held as follows:—"The expression 'preliminary point' used in that section is not confined to such legal points only as may be pleaded in bar of suit, but comprehends all such points as may have prevented the Court from disposing of the case on the merits whether such points are pure questions of law or pure questions of fact." The same view was held by the Madras High Court in *Ram Chandra Joshi v. Hazi Kassim* (2). In that case Mr. Justice Best said, at page 212:—"I take it that a suit is disposed of on a preliminary point within the meaning of section 562 when by reason of the decision on one or more of the issues recorded in the case there has been no necessity for the consideration of the other issues; and that if in such a case the appellate Court finds that the issues considered have been wrongly decided and the suit in consequence wrongly dismissed, and that a consideration of the other issues is necessary for a proper disposal of the suit, a remand is allowable." We think that the interpretation so put upon the words "preliminary point" is at least a convenient one and was probably what the Legislature intended when it amended section 562. As the Court of first instance did not decide this case upon the merits in consequence of the conclusion at which it arrived on the question of the validity of the award, and also on the question of limitation, we think the Court below acted within its jurisdiction in remanding the case.

section 562.

...ly dismiss the appeal with costs.

*Appeal dismissed.*

All.,

(2) (1892) I. L. R., 16 Mad., 207.

*Before Mr. Justice Banerji and Mr. Justice Richards.*

ALI AKBAR AND OTHERS (DEFENDANTS) v. KHURSHED ALI AND

ANOTHER (PLAINTIFFS).\*

1905  
May 10

*Civil Procedure Code, section 629—Review of judgment—Appeal from order granting a review—Grounds for such appeal.*

When an application for review of judgment has been granted for "any other sufficient reason," the sufficiency or otherwise of the reason for granting it is not a ground of appeal within the meaning of section 629 of the Code of Civil Procedure.

*Per RICHARDS, J.*—But the fact that the Court fee on the plaint, at first held to be inadequate, is afterwards found to be sufficient is a good ground for granting a review of judgment.

In this case the plaintiffs' suit was dismissed upon the ground that the plaint was insufficiently stamped, and that by the time the deficiency was made good the suit was barred by limitation. The plaintiffs applied for a review of judgment upon the ground that in reality the court fee which they had originally paid was more than sufficient. The Court (Additional Subordinate Judge of Aligarh) found that this plea of the plaintiffs' was correct and granted the application for review, and directed that the plaintiffs' appeal should be heard on the merits. Against this order the defendants appealed to the High Court.

*Mr. Abdul Raoof*, for the appellants.

*Munshi Ghulam Mujtaba*, for the respondents.

*BANERJI, J.*—This is an appeal from an order admitting an application for a review of judgment, and is made on the ground that the Court in granting the application has contravened the provisions of section 626 of the Code of Civil Procedure. The only clause of section 626 which may apply to the case is clause (b) of the proviso to that section. The first paragraph of the section does not apply, nor does the second, as the Court has recorded reasons for granting the application. The proviso is in our judgment inapplicable. We have not granted the application on the ground of evidence. It was of opinion that the reason for granting the application with section 623. Whether the Court was right or wrong.

\* First Appeal No. 146 of 1904 from an order of Bakhsh, Additional Subordinate Judge of Aligarh, dated 1904.

Muhammad Maula  
24th of September

1905

ALI AKBAR  
v.  
KHURSHED  
ALI.

that point is not a matter which we need consider in this appeal, inasmuch as an appeal from an order admitting a review can be brought on one of the three grounds mentioned in section 629, and on those grounds only. The insufficiency of the reason for which an application for review is admitted is not one of the grounds mentioned in that section; the appeal therefore fails, and is dismissed with costs.

RICHARDS, J.—I concur. I think that if after a suit had been dismissed on the technical ground that the stamp was originally insufficient it was subsequently found that the stamp was all along sufficient, that fact constitutes a most fitting ground for granting a review and is clearly "other sufficient ground" within the meaning of section 623.

*Appeal dismissed.*

1905  
May 12.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice  
Sir William Burkitt.*

JAGGI LAL AND ANOTHER (DEFENDANTS) v. SIR W. E. COOPER (PLAINTIFF).  
*Suit for specific performance—Lease—Covenant for renewal—Construction of document—Time, whether or not of the essence of a contract.*

The plaintiff sued for specific performance of a covenant for renewal contained in a lease, the material clause of which was as follows:—"After the expiration of the said term, if the lessee shall so desire, the executant shall have no objection whatever to renew the lease for a further term of twenty years on the terms and in consideration of payment of the rent mentioned in the lease." There was nothing in the lease to indicate that notice of intention to renew was to be given before its expiration.

*Held* on a construction of the lease that time was not of the essence of the contract, and that the plaintiff had not forfeited his right to have the lease renewed by reason of having allowed some months to elapse after the expiration of the original term before he gave notice to the defendants of his intention to take advantage of the covenant for renewal.

THIS appeal, and also Second Appeals Nos. 161, 162 and 163 of 1900, are appeals from the decisions of two suits brought by the plaintiff under the provisions of the Indian Contract Act, 1872. One Gur Prasad Shukul, on the 1st of January 1900, executed a lease of a plot of land in favour of the defendant, Sir W. E. Cooper, for a term of twenty years, with a covenant for renewal of the lease for a further term at the option of the plaintiff. He also,

\* Second Appeal No. 160 of 1903, from a decree of J. Denman, Esq., District Judge of Cawnpore, dated the 22nd of November 1902, confirming a decree of Pandit Kanhaiya Lal, M. A., Munsif of Cawnpore, dated the 30th of September 1901.

1905

JAGGI LAL

v.  
SIR W. E.  
COOPER.

on the 24th of February 1880, executed a lease of another plot of land for a like term of 20 years, containing a similar covenant for renewal. The term of the first lease expired on the 27th of June 1899 and the term of the second lease on the 24th of February 1900. Upon the plots of ground a factory was built by the plaintiff. On the 30th of October 1899 the lessor Gur Prasad Shukul's representatives sold and conveyed their interest in the property to the present appellants. No notice of this transfer was given to the plaintiff. On the 24th of January 1900, that is, some months after the expiration of the term of the lease of the 27th of June 1879, the plaintiff served notice upon the representatives of the lessor of his desire to obtain a renewal of the lease in accordance with the covenant contained in it. At this time it is to be observed that one lease had expired, but the term of the other had not yet expired. No notice was taken by the representatives of the lessor of this notice, and some time elapsed before the plaintiff discovered that his lessor's representatives had transferred their interest to the present appellants. On discovery of the sale to them, he, on the 28th of January 1901, served a notice upon them requiring them to execute renewals of the two leases under the agreements contained in them. This notice was served after some preliminary negotiations with them on the subject. The provisions of each of the leases in regard to renewal have been translated as follows:—"After the expiration of the said term, if the lessee shall so desire, the executant shall have no objection whatever to renew the lease for a further term of 20 years, on the terms and in consideration of payment of the rent mentioned in the lease." The defendants refused to renew the lease and the plaintiff thereupon, on the 8th of March 1901, instituted a suit claiming specific performance of the covenant for renewal contained in his lease of the . . . The Court of first instance (Munsif of . . . claim, and this decree was an appeal con- . . . Judge. The defendants appealed to the High

Mr. B. E. O'Connor and Muhammad Ishac for the appellants.

Mr. C. Dillon, for the respondent.

1905

JAGGI LAL  
v.  
SIR W. E.  
COOPER.

STANLEY, C. J., and BURKITT, J.—This appeal, as also Second Appeals Nos. 161, 162 and 163, arises out of two suits brought by the plaintiff respondent for the specific performance of a covenant for renewal contained in two leases. One Gur Prasad Shukul, on the 27th of June 1879, executed a lease of a plot of land in favour of the plaintiff for a term of 20 years, with a covenant for renewal for a like term at the option of the plaintiff. He also, on the 24th of February 1880, executed a lease of another plot of land for a like term of 20 years, containing a similar covenant for renewal. The term of the first lease expired on the 27th of June 1899 and the term of the second lease on the 24th of February 1900. Upon the plots of ground a factory was built by the plaintiff. On the 30th of October 1899 the lessor Gur Prasad Shukul's representatives sold and conveyed their interest in the property to the present appellants. No notice of this transfer was given to the plaintiff. On the 24th of January 1900, that is, some months after the expiration of the term of the lease of the 27th of June 1879, the plaintiff served notice upon the representatives of the lessor of his desire to obtain a renewal of the lease in accordance with the covenant contained in it. At this time it is to be observed that one lease had expired, but the term of the other had not yet expired. No notice was taken by the representatives of the lessor of this notice, and some time elapsed before the plaintiff discovered that his lessor's representatives had transferred their interest to the present appellants. On discovery of the sale to them, he, on the 28th of January 1901, served a notice upon them requiring them to execute renewals of the two leases under the agreements contained in them. This notice was followed after some preliminary negotiations with them by a statement of the provisions of each of the leases in regard to renewal, which was translated as follows:—"After the expiration of the term of the lease, if the lessee shall so desire, the executant shall be bound to renew the lease for a further term of 20 years, and in consideration of payment of Rs. 1000 per annum, as provided in the lease." This is a simple agreement by the lessor to renew the leases for further terms of 20 years, if the lessee after the expiration of the term

1905

JAGGI LAL

SIR W. E.  
COOPER.

of the leases shall desire to have them renewed. It is to be observed that there is no provision that the lessees shall intimate his desire to obtain a renewal within any particular time; time in fact was not made of the essence of this contract. Now if time had been of the essence of the contract, the contract being unilateral, that is, creating an option privilege in favour of one of the contracting parties, strict compliance with the terms of the contract as to time would have been required, but there is an entire omission of any restriction upon the right of the lessee to obtain renewals in the matter of time. It was only obligatory upon him to require a renewal, or renewals, to be granted to him within a reasonable time after the expiration of the terms of the leases. The defendants appellants, we may observe, have been in no way prejudiced by any delay which has occurred. If on the expiration of the leases they had required the plaintiff to determine whether or not he would exercise his privilege and take the renewals, and he had neglected to do so for any considerable time, then the defendant might no doubt rely upon such laches and delay as an answer to a suit for specific performance. But nothing of the kind has happened in this case. It seems to us on obvious principles of equity that the plaintiff was entitled to maintain his suits for specific performance and that the decrees of the Courts below in his favour must be upheld. We therefore dismiss this and the connected appeals with costs in all Courts.

As regards the amount of fees which have been awarded in the Courts below and also as regards the fees of counsel in this Court our attention has been called to the fact that in the Court of first instance both parties applied to the learned Judge to give a fee in excess of the ordinary fee owing to him for the questions raised in the suit and to the time which was occupied in the disposal of the same. Before us, though several grounds were put forward, only one which has been supported is that the defendant had served notice of his intention to apply for renewal of the leases at the expiration of the terms of the leases. The other grounds of appeal have been abandoned, but no doubt the plaintiff was prepared to argue the several other questions which were raised.

1905

JAGGI LAL

v.  
SIR W. E.  
COOPER.

in the Court below and which are referred to in the grounds of appeal. We think under the circumstances and having regard to the action of the parties themselves, that the fees should be higher than those prescribed by the rules. We accordingly direct that in respect of the hearing in the Court of first instance a fee of Rs. 50 should be allowed in each case, in the lower appellate Court a fee of Rs. 100 on each appeal; and in this Court a fee of Rs. 100 on each appeal, that is, the fees in the three Courts shall amount to Rs. 500 altogether.

This disposes of this appeal and also appeals Nos. 162 and 163 of 1903 and also the objection under section 561 of the Code of Civil Procedure in Second Appeal No. 161 of 1903.

*Appeal dismissed.*

1905

May 15.

## REVISIONAL CIVIL.

*Before Mr. Justice Banerji and Mr. Justice Richards.*

HUKAM SINGH (DECREE-HOLDER) v. RAGHUBIR SARAN (OBJECTOR).\*

*Execution of decree—Civil Procedure Code, section 278—Decree for sale on a mortgage—Prior mortgagee not entitled to intervene in execution proceedings.*

In a suit for sale on a mortgage the plaintiff obtained a decree and an order absolute for sale of the mortgaged property. A person who had not been a party to the suit intervened, alleging himself to be a prior mortgagee, and objected to this sale, and the sale was stopped. *Held* that the prior mortgagee, if he were one, was not entitled to intervene in these execution proceedings and that the order allowing his objection was passed without jurisdiction and was a proper subject for revision.

In this case one Hukam Singh brought a suit for sale on a mortgage and obtained a decree and an order absolute for sale of the mortgaged property. Raghubir Saran filed an objection in the execution proceedings, objecting to the decree, in which he took exception to the sale of the mortgaged property upon the ground that he was a prior mortgagee and had not been made a party to the suit, notwithstanding that, his mortgage being registered, the decree-holder must be taken to have had notice of it. The Court (Munsif of Meerut) accepted this plea



1905

HUKAM  
SINGHv.  
RAGHUBIR  
SARAN.

and stopped the sale. The decree-holder thereupon applied to the High Court for revision of this order.

The Hon'ble Pandit *Madan Mohan Malaviya*, for the applicant.

BANERJI and RICHARDS, JJ.—This application must be allowed. The applicant, who is a puisne mortgagee, obtained a decree for sale without making the respondent, who claims to be a prior mortgagee of the property, a party to his suit. He obtained an order absolute for sale and then proceeded to sell the property in execution. Thereupon the respondent, claiming to be the prior mortgagee of the property, objected to the sale of the property, and contended that his prior mortgage ought to have been redeemed. His objection was allowed, and the Court made an order to the effect that the property should not be sold. We are of opinion that this order was passed without jurisdiction. Section 278 of the Code of Civil Procedure did not apply to the case, as the property sought to be sold was not attached in execution, but the decree had ordered its sale. We are not aware of any provision of law under which the respondent could legally intervene. The Court executing the decree was bound to give effect to the decree as it stood, and as the decree ordered sale of the property, the Court had no power to go behind the decree and investigate the existence or non-existence of a prior mortgage. The decree-holder could only proceed against the property at his own peril, and the prior mortgagee, if such he be, could not be damnified in any way. As the order complained of was in our judgment passed without jurisdiction, we allow the application and set aside the order with costs.

## APPELLATE CIVIL:

1905  
May 22.

*Before Mr. Justice Banerji and Mr. Justice Richards.*

WAHID-UN-NISSA AND OTHERS (JUDGMENT-DEBTORS) v. GIRDIHARI AND  
ANOTHER (DECREE-HOLDERS).\*

*Civil Procedure Code, section 244—Execution of decree—Sale in execution—  
Application to set aside sale on the ground of fraud.*

An application to set aside on the ground of fraud a sale held in execution of a decree can be made under section 244 of the Code of Civil Procedure even after the sale has been confirmed. *Mohi Lal Chakraborty v. Russick Chandra Bairagi* (1) and *Durga Charan Mandal v. Kali Prasanna Sarkar* (2) followed. *Prosunno Kumar Sangal v. Kali Das Sangal* (3) referred to.

THIS was an appeal arising out of the execution of a decree. The decree-holders under a decree for sale caused certain property of the judgment-debtors to be sold on the 20th of September 1902. This sale was confirmed on the 20th of November 1902, the decree-holders themselves being the auction purchasers. On the 30th of June 1903 the judgment-debtors applied to the Court which had executed the decree, purporting to do so under the provisions of section 244 of the Code of Civil Procedure, to have the sale of the 20th of September 1902 set aside upon the ground that it had been procured by means of a fraud on the Court and on the judgment-debtors. It was said that the property which had been sold was ancestral property and that the execution of the decree should therefore have been transferred to the Collector under the provisions of section 320 of the Code. The application made various allegations of fraud in respect of the execution proceedings and the auction sale. The Court of first instance (Munsif of Khurja) allowed the application and set aside the sale. On appeal the lower appellate Court (Additional District Judge of Aligarh) refused to go into the case, being of opinion that no such application could be made under section 244 of the Code of Civil Procedure. No appeal lay to him. The judgment-

*Mohi Lal Chakraborty v. Russick Chandra Bairagi*, 1904.

(1) (1896) I. L. R. 19, 20 Cal. 100, 101.

26 Cal., 326.

(2) (1899) I. L. R., 26 Cal., 727.

(3) (1892) I. L. R., 19 Cal., 683.

of 1904 from a decree of J. H. Cuming, Esq., dated the 18th of March 1904, reversing a decree of Mr. Banerji, Munsif of Khurja, dated the 9th of January

debtors' application was accordingly dismissed. The judgment-debtors appealed to the High Court.

Babu *Satya Chandra Mukerji*, for the appellants.

Mr. G. W. Dillon and Dr. *Satish Chandra Banerji*, for the respondents.

1905

WAHID-UN-  
NISSA  
v.  
GIRDHARI.

BANERJI and RICHARDS, JJ.—The respondents obtained a decree for sale against the appellants and caused certain property to be sold on the 20th of September 1902. The sale was confirmed on the 20th of November 1902, the decree-holders themselves being the auction purchasers. The judgment-debtors made the application out of which this appeal has arisen on the 30th of June 1903, purporting to make it under the provisions of section 244 of the Code of Civil Procedure, on the allegation that the sale of the property had been brought about by the decree-holders by perpetrating a fraud both upon the Court and upon the judgment-debtors. It is said that the property which was sold was ancestral property and that the execution of the decree should have been transferred to the Collector under the provisions of section 320. The application of the judgment-debtors makes various allegations of fraud in respect of the execution proceedings and the auction sale. The Court of first instance allowed the application and set aside the sale. On appeal the learned District Judge refused to go into the merits of the case, being of opinion that the application could not be properly made under the provisions of section 244 and that no appeal lay to him. This view is opposed to some rulings of the Calcutta High Court which have been referred to. We may refer to *Moti Lal Chakraborty* (1) and *Durga Charan Mandal v.* In the case last mentioned it was held that we have a sale set aside on the ground of fraud under section 244, even after the sale was confirmed. It is to be in consonance with the principle laid down by the Council in *Prosunno Kumar S.* The lower appellate Court was to entertain the appeal and to try the case by the parties. We need not

(1) (1896) I. L. R., 26 Calc., 326, foot-note.  
(3) (1892) I. L. R.,

26 Calc., 727.

1905

WAHID-UN-  
NISSA  
v.  
BHARI.

representation made by the decree-holder that the property was non-ancestral was not in fact correct, that fact alone would not make his conduct fraudulent unless the representation was made with fraudulent intent. As, however, the case was decided upon a preliminary point and the decision upon that point is in our opinion, erroneous, we allow the appeal and remand the case under section 562 of the Code of Civil Procedure for trial upon the merits. Costs here and hitherto will follow the event.

*Appeal decreed and cause remanded.*

1905

May 23.

*Before Mr. Justice Banerji and Mr. Justice Richards.*

BHAGAT BIHARI LAL (JUDGMENT-DEBTOR) v. RAM NATH  
(DECREE-HOLDER).\*

*Act No. XI of 1877 (Indian Limitation Act), section 7—Minority—Death of decree-holder leaving a minor representative surviving him—Limitation.*

*Held* that the person whose minority would, under section 7 of the Indian Limitation Act, 1877, save the operation of limitation must be the person who was entitled to bring the suit or make the application on the date from which the period of limitation for the particular suit or application was to be reckoned. *Lachman Prasad v. Bhagwan Singh* (1) followed.

THIS appeal arose out of an application for execution of a decree made under the following circumstances. On the 6th of February 1891, one Baijnath obtained a decree under section 88 of the Transfer of Property Act, 1882, against Bhagat Bihari Lal. On the 21st of March 1896, the decree-holder obtained an order absolute for sale under section 89 of the Act. He died on 1st November 1897 leaving his grandson Ram Nath, who was then a minor, as his heir and legal representative. He attained the age of majority in 1903. On 1st November 1903, Ram Nath applied for sale of the mortgaged property under the decree held by his grandfather. The Munsif of Nagina allowed the application, but on objection to the effect that execution was barred by limitation and accordingly rejected.

\* First App.  
Kishor Dat, Sub.

from order No. 12 of 1905 from an order of Pandit Giraj  
to Judge of Moradabad, dated the 13th of October 1904.

(1) Weekly Notes, 1886, p. 49.

Ram Nath's application. On appeal the Subordinate Judge of Moradabad reversed the Munsif's order, holding that execution was not time-barred, and remanded the case to the first Court to proceed with the execution. Against this order the judgment-debtor appealed to the High Court.

*Munshi Gulzari Lal*, for the appellant.

*Dr. Tej Bahadur Sapru*, for the respondent.

BENERJI and RICHARDS, JJ.—In our judgment this appeal must prevail. The question is whether the application made by the respondent on the 9th of April 1904 for execution of a decree under section 88 of Act No. IV of 1882 passed on the 6th of February 1891 was time-barred or not. The decree was obtained by Baijnath, the grandfather of the respondent, who also obtained an order absolute for sale on the 21st of March 1896. He died on the 11th of December 1897 leaving the respondent, who was then a minor, as his heir and legal representative. The respondent attained majority in 1903. It is manifest that the application of the 9th of April 1904 would be beyond time unless the operation of limitation was saved by the provisions of section 7 of the Limitation Act. That section provides that if a person entitled to institute a suit or make an application be, at the time from which the period of limitation is to be reckoned, a minor, he may institute the suit or make the application after attaining majority within the same period as would have otherwise been allowed for the suit or application. It is clear that the person whose minority would save the operation of limitation must be the person who was entitled to bring the suit or make the application on the date from which the period of limitation for the particular application was to be reckoned. In this case it is manifest that the application should be reckoned from the 21st of March 1896, the date of the order absolute for sale. The person who made the application for execution on the 9th of April 1904 was not a minor. Consequently the respondent cannot avail himself of the benefit of section 7. The Subordinate Judge holds that as Baijnath and Ram Nath were members of a joint Hindu family, Baijnath was interested in the decree, and was therefore competent to take

1905

BHAGAT  
BIHARI LAL  
v.  
RAM NATH.